STUDY

Requested by the PETI committee

Cross-Border Legal Recognition of Parenthood in the EU

Policy Department for Citizens' Rights and Constitutional Affairs
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Cross-Border Legal Recognition of Parenthood in the EU

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Petitions, has as its aim to analyse the Commission's proposal for a Regulation on the recognition of parenthood in the EU. The study examines the problem of non-recognition of parenthood between Member States and its causes, the current legal framework and the (partial) solutions it offers to this problem, the background of the Commission proposal, and its text. It also provides a critical assessment of the proposed Regulation and issues policy recommendations for its improvement.

This document was requested by the European Parliament's Committee on Petitions.

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LIST OF ABBREVIATIONS

App.	Application
ART	Assisted Reproductive Technology
Charter	Charter of Fundamental Rights of the EU
CJEU	Court of Justice of the EU (also referred to as 'the Court')
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights (also referred to as 'the Court')
EEC	European Economic Community
EU	European Union
HCCH	Hague Conference on Private International Law
IIA	Inception Impact Assessment
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
NELFA	Network of European LGBTIQ* Family Associations
NGO(s)	Non-governmental organisation(s)
No.	Number
OJ	Official Journal
OPC	Open public consultation
PETI	Committee of Petitions of the European Parliament
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
UNICEF	United Nations Children's Fund
USA	United States of America

EXECUTIVE SUMMARY

This study examines the **Commission's proposal for a Regulation on the cross-border recognition of parenthood in the EU**.

Parenthood is a civil status that is central to a person's identity and from which many important rights and obligations are derived. Each Member State has developed its own concept of civil status, taking into account its history, culture, and legal system. **Substantive family law is an area that falls within Member State competence, however the EU may adopt measures on aspects of family law with cross-border implications.** Therefore in purely domestic situations that lack a cross-border element, it is up to each Member State to determine the rules regarding the establishment of parenthood within its territory and the legal effects that ensue from it. Given that the establishment of the parenthood of a child and the issuance of the civil status or judicial documents attesting this is, in most situations, required in order for the family to access certain public services or entitlements or to obtain social benefits such as family allowances and tax deductions, being unable to establish, in law, the parenthood of a child, can have **severe practical repercussions for a family**.

A family can also suffer negative consequences if parenthood established under the legal system of one State is not recognised under the legal system of another State. Such problems of non-recognition are particularly pertinent in the EU context when families exercise their **free movement rights**: in such situations it can happen that whilst the family is already legally recognised as a family in the Member State of origin where filiation between the child and both parents has been legally established, when it moves to the host Member State **the familial ties among (some or all of) its members will cease to exist** in law. This results in children having either limping statuses in that they are legally considered as the children of their parents in one Member State but they are not legally recognised as such in another, or experiencing uncertainty as to their legal parenthood in situations where their situation presents points of contact with more than one Member State. In addition to the problem of complete non-recognition of parenthood, another problem is that in some cases, parenthood can be recognised by a Member State, but only after **lengthy, costly, and, thus, burdensome procedures**, which may constitute an obstacle to free movement within the EU and a violation of a number of fundamental rights stemming from EU law.

The problem of non-recognition of parenthood in cross-border situations arises from the fact that Member States have different substantive family law rules regarding the establishment of parenthood within their territory. This, however, is not the only cause of the problem. **The existence of different substantive rules regarding the establishment of parenthood becomes a problem when it is combined with the fact that Member State private international law rules in the area of family law also differ when it comes to the establishment and recognition of parenthood**. The **private international law** rules of a Member State determine which substantive law is applicable in a situation where two or more national substantive law rules can apply (the question of **applicable law**), which State's courts are competent to deal with a specific matter when a situation has points of contact with more than one State (the question of **jurisdiction**), and whether a judgment or authentic instrument issued in another State should be recognised and enforced in that Member State (the question of **recognition**). The fact that different Member States have different private international law rules means that when determining which *one* of the substantive family law rules of different Member States should apply in a situation concerning parenthood, or the courts of which Member State have jurisdiction to deal with parenthood matters, **different results** are prescribed by different Member States. What is more, Member States also have different private international law rules with regard to

the *recognition* of parenthood already established abroad, including in other Member States, and, thus, some Member States will automatically recognise such parenthood, whereas others will not.

Currently, EU law does not provide a wholesome solution to the problem of non-recognition of parenthood. **Some solutions to this problem have been provided judicially, by the CJEU in the recent *V.M.A.* case, and by the ECtHR in cases involving the cross-border recognition of the parenthood of adopted and surrogate-born children, but these are only partial solutions**. Moreover EU Regulations which have unified the private international law rules of the Member States regarding family law matters do not include the establishment and recognition of parenthood in their scope.

The question of the cross-border recognition of parenthood has been on the agenda of EU institutions for over a decade now. Therefore, it did not come as a surprise that in her **State of the Union address in September 2020, the Commission President stated that '[i]f you are parent in one country, you are parent in every country' and declared that she would push for mutual recognition of family relations in the EU**. Work on the proposal began soon after, in February 2021, when a Commission inter-services steering group was established for working on the initiative.

The Commission adopted its proposal on 7 December 2022, the full title of which is '**Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood**'. The proposed Regulation makes provision for the following: a) the adoption of common rules for the determination of the courts of the Member States that have jurisdiction in matters related to the establishment of parenthood in cross-border situations; b) the adoption of common rules for the determination of the law applicable to the establishment of parenthood in cross-border situations; c) a mutual recognition obligation of parenthood established in a Member State; and d) the creation of a European Certificate of Parenthood, which can be issued by the Member State where parenthood was established and can be used to prove parenthood in all other Member States.

The proposed Regulation is a very positive step towards a wholesome EU solution to the problem of non-recognition of parenthood in the EU, in situations presenting a cross-border element. It will **enhance legal certainty and will – as a result – save time and costs, both for families** whose situation presents a cross-border element but also for the judicial and administrative **authorities** of Member States involved in the procedures for the establishment and recognition of parenthood. Legal certainty and predictability will be further enhanced through the introduction of the European Certificate of Parenthood. The proposed Regulation has at its core the aim of **protecting the rights of the child** and this is reflected, inter alia, in the fact that it is an inclusive, child-focused, instrument which covers the situation – and thus protects the rights – of *every child* whose parenthood has been established in an EU Member State. If it comes into force, the proposed Regulation will therefore solve many of the problems and difficulties encountered by families in a cross-border context.

Nonetheless, there are a number of **gaps in protection** that will persist even if the proposed Regulation will enter into force: the instrument will not apply to Denmark and it is not clear if Ireland will exercise its opt-in to be bound by it; it has a limited territorial scope in that it excludes all situations where parenthood is established in a third country; it includes no safeguards for protecting the child's right to know its origins; and it includes a public policy exception which – unless it is ensured that it is interpreted narrowly – may be abused by the Member States in order to avoid their obligations under the instrument. Nonetheless, the biggest challenge will be to ensure that the proposal will, indeed, come into force: obtaining the **unanimous** approval of the proposal by all Member States in the

Council – as is required by the legal basis chosen (Article 81(3) TFEU) – is bound to be an uphill struggle and, in the end, may prove impossible.

Accordingly, as a response to the above gaps and challenges, the study makes the following **recommendations** regarding the proposal:

(1) In order to improve the clarity of the instrument and the predictability of the outcome of cases and scenarios where it will apply, it is recommended that (if and) once the proposed Regulation comes into force, the **Commission should issue guidelines** on its application and enforcement. These guidelines should be issued in simple language in order to make the instrument more accessible to families and generally to the public with no special legal knowledge.

(2) In order to improve the clarity of the instrument and the predictability of the outcome of cases and scenarios where it will apply, it is recommended that (if and) once the proposed Regulation comes into force, national judges, civil servants, and legal practitioners should receive **training** in order to be able to interpret and apply the Regulation uniformly.

(3) In order to improve the clarity of the instrument and the predictability of the outcome of cases and scenarios where it will apply, it is recommended that (if and) once the proposed Regulation comes into force, whenever there will be doubt as regards the interpretation of a provision of the proposed Regulation, national judges should use the **preliminary ruling mechanism in order to obtain an authoritative interpretation of it from the CJEU**, which will be uniformly applicable in all Member States.

(4) **EU institutions should not amend the instrument in order to exclude surrogate-born children from its scope**. This is for two reasons.

First, given that the aim of the proposed Regulation is to protect and respect the fundamental rights – and best interests – of children, it would be difficult to justify the exclusion from its protection (*and the continuing violation of their right to respect for private life,* as established in the ECtHR case-law analysed in chapter 3 of the study) of surrogate-born children. In particular, **such an exclusion would amount to discrimination based on birth contrary to Article 21 of the Charter**, as it would penalise surrogate-born children because of the way they were conceived, carried, and given birth to. Such discriminatory exclusion could constitute a reason for challenging the validity of the instrument through an Article 258 TFEU action.

Second, as ECHR signatory States, all **EU Member States are already required by the ECtHR case-law** – analysed in chapter 3 of this study – **to recognise**, in certain circumstances, **the parenthood of surrogate-born children established in another country**; in addition, Article 52(3) of the Charter requires the interpretation of its provisions in a way which imposes on EU Member States at least the same obligations as those that the ECHR – as interpreted by the ECtHR – imposes on its signatory States. Accordingly, in practice, the inclusion within the personal scope of the proposed Regulation of surrogate-born children **does not impose a new recognition obligation on Member States**, as they are anyway already bound by such an obligation by the ECtHR jurisprudence, through their ECHR membership as well as under the Charter, which must be interpreted as granting protection which is at least equivalent to that provided by the ECHR.

(5) The Commission and the Member States need to work together in order to persuade **Ireland** to make use of the procedure laid down in Articles 3 and 4 of Protocol (No 21) on the position of the UK and Ireland in respect of the area of freedom, security and justice, to **opt-in** to the adoption and application of the measure and to accept to be bound by it.

(6) A **provision should be added** to the proposed Regulation that will state that in all procedures concerning the establishment and recognition of parenthood which fall within the scope of application of this instrument, the **right of the child to know its origins** should, as far as possible, be **protected**.

(7) The Commission as guardian of the Treaties must ensure that the **public policy exception** laid down in the proposed Regulation is **interpreted restrictively** and that the **Member States** are allowed to **rely on it exceptionally** and only when there is a genuine danger to public policy and when this is proportionate and does not amount to a violation of fundamental rights and does not contradict the best interests of the child**.** The **above requirements** regarding the interpretation and application of the public policy exception **should also be noted by the Commission in the guidelines** that – as per Recommendation 1 – **it should issue** on the application and enforcement of the proposed Regulation (if and) once it comes into force.

(8) **The Commission should consider extending the territorial scope of application of the proposed Regulation to situations where parenthood was established in a third State,** for two reasons.

First, given that the aim of the proposed Regulation is to protect and respect the fundamental rights – and best interests – of children, it will be difficult to justify the exclusion from its protection (*and the continuing violation of their right to respect for private life* under Article 8 ECHR*,* as established in the ECtHR case-law analysed in chapter 3 of the study) of *some* children, namely, children who happened to have been born in a third State where their parenthood was established. In particular, **such an exclusion amounts to discrimination based on birth contrary to Article 21 of the Charter**.

Second, as ECHR signatory States, all **EU Member States are already required by Article 8 ECHR as interpreted by the ECtHR in its case-law** – analysed in chapter 3 of this study – **to recognise the parenthood of (surrogate-born and adopted) children as this was established *in any country (including in a third country)***: accordingly, in practice, the extension of the territorial scope of the proposed Regulation to cover situations where parenthood was established in a third country **would not impose a new obligation on EU Member States, as they are already bound by such an obligation** by the ECtHR jurisprudence, through their ECHR membership. Furthermore, as noted earlier, such an obligation can be read as stemming from Article 7 of the **Charter** which lays down, inter alia, the right to private life, since Article 52(3) of the Charter provides that Charter rights which correspond to ECHR rights must be interpreted in a way which grants *at least* the same protection as granted by the ECHR rights.

(9) Due to the requirement of unanimity in the Council laid down in the legal basis chosen by the Commission, EU institutions need to work hard in **convincing *all* Member States to approve in the Council the proposal (at least) as it is**. The approval of a watered-down version of the original proposal, the endless continuation of negotiations on the original proposal until – in some unspecified date in the future – there is appetite for its adoption by all Member States, or the adoption of the proposal through enhanced cooperation by only some Member States, are **not satisfactory alternatives** in case it is not possible to reach unanimity in the Council.

In addition to the above recommendations, the following recommendations are made in order to enhance the cross-border recognition of parenthood under the ***current* legal framework**:

(10) If **Bulgaria** continues to fail to comply with the CJEU judgment in *V.M.A.* concerning the cross-border recognition of parenthood for the purpose of the exercise of rights derived from EU law, **the Commission should take enforcement action** against that Member State under Article 258 TFEU for failing to comply with its obligations under EU law. The Commission should also examine whether the **other 26 Member States** comply with the judgment and take enforcement action against any that do not comply.

(11) The Commission should issue a **Communication** clarifying that in situations that fall within the scope of EU law, all Member States must **ensure the continuity, in law, of the filiation** of a child – whether this was established in a Member State or a third country – at least in all the circumstances where, according to ECtHR case-law, this is required under the **ECHR**.

1. INTRODUCTION

1.1. Background of the study

This study, commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs of the European Parliament upon the request of the PETI committee, **has as its aim to examine the Commission's proposal** for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (hereinafter 'the proposal' or 'the proposed Regulation'), which was adopted in December 2022.[1]

It is estimated that in the EU currently **up to 2 million children may face difficulties with the recognition by a Member State of their parenthood, which was established in another Member State**.[2] This involves children having either limping filiation statuses in that they are legally considered as the children of their parents in one Member State but they are not legally recognised as such in another, or experiencing uncertainty as to their legal parenthood in cross-border situations. The non-recognition of parenthood is a **significant problem which requires an EU solution**, given that it cannot be resolved by Member States acting individually.[3]

The question of the cross-border recognition of parenthood has been on the agenda of the Commission for over ten years.[4] However, it is only **following the Commission President's statement in 2020** in her State of the Union address,[5] that 'if you are parent in one country, you are parent in every country' and her promise that she would push for mutual recognition of family relations in the EU, **that the first concrete steps towards a solution to this problem at EU level have been taken.** These steps **have culminated in the publication of the proposal under examination in this study**.

1.2. Objective and scope of the study

The study has as its objective to analyse the Commission's proposal, which aims to address the problem of non-recognition of parenthood encountered by families and their children in cross-border situations within the EU. For this purpose, it examines (i) the problem of non-recognition of parenthood between EU Member States and its causes, (ii) the current legal framework and the (partial) solutions it offers to this problem, (iii) the background of the Commission proposal, (iv) the text of the proposal, (v) whether the proposal solves the existing problems with non-recognition of parenthood in the EU, (vi) the gaps left by the proposal and the challenges that may ensue in the process of its adoption by the Council, and (vii) action that can be taken to fill these gaps and to respond to these challenges.

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1 COM(2022) 695 final. The full text of the proposed Regulation is available here: https://commission.europa.eu/document/928ae98d-d85f-4c3d-ac50-ba13ed981897_en.

2 Explanatory Memorandum attached to the proposed Regulation, p. 2.

3 Commission Staff Working Document 'Subsidiarity Grid' accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood SWD(2022) 390 final, p. 6, section 2.4. The document is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2022%3A390%3AFIN&qid=1670583901517.

4 See chapter 4 of the study.

5 State of the Union Address by President von der Leyen at the European Parliament Plenary, Brussels, 16 September 2020. The full text of the President's Address is available here: https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2020_en.

1.3. Working methodology

This study relies on a **legal analysis of the relevant primary and secondary sources**. In particular, it takes account of legislation and official publications of the EU, CJEU case-law and petitions submitted to the European Parliament, studies, research, and academic legal writing on the matter, media publications, and preparatory documents leading up to the proposal. Moreover, due to the fact that the non-recognition of parenthood is not a problem that ensues only in the EU context, the study will, to the extent necessary, refer to the international framework (the HCCH) and other regional instruments (the ECHR), in order to demonstrate the solutions that they currently or potentially offer to this problem, and which are – or will be – applicable also to EU Member States.

1.4. Terminology

A few words of **clarification** should be offered **regarding the terminology** used in the proposal, which is adopted also for the purposes of this study.

1.4.1. 'Parenthood'

One of the preliminary questions that the Commission had to consider when determining the title of the proposed Regulation concerned the main term that should be used when describing the instrument's subject matter. The Commission has chosen the term 'parenthood', which is used in the title of the proposal as well as throughout its provisions and the documents accompanying it. Other options that could have been chosen are 'filiation' (which would emphasise the child-focused character of the proposal) or 'parentage' (which is the term that is used by the HCCH in its instruments).[6] In any event, although the term that has been adopted is 'parenthood', the Commission treats the term 'filiation' as synonymous with it for the purposes of this instrument.[7]

'Parenthood' for the purposes of the proposed Regulation is defined in Article 4.1., according to which it means **'the parent-child relationship established in law. It includes the legal status of being the child of a particular parent or parents'.** Further clarification is provided in the Explanatory Memorandum accompanying the proposal, which adds the following: 'For the purposes of the proposal, parenthood may be biological, genetic, by adoption or by operation of law. As noted, the proposal covers the parenthood established in a Member State of both minors and adults, including a deceased child and a child not yet born, whether to a single parent, a de facto couple, a married couple or a couple in a registered partnership. It covers the recognition of the parenthood of a child irrespective of how the child was conceived or born – thus including children conceived with assisted reproductive technology – and irrespective of the child's type of family – thus including children with two same-sex parents, children with one single parent, and children adopted domestically in a Member State by one or two parents'.[8]

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6 For an explanation of the difference between the concepts of 'parenthood' and 'parentage' see J. M. Scherpe, 'Breaking the existing paradigms of parent-child relationships' in G. Douglas, M. Murch and V. Stephens (eds), *International and National Perspectives on Child and Family Law* (Cambridge University Press, 2018), pp. 352-356. For an argument favouring use of the term 'filiation' see I. Pretelli, 'Filiation between Law, Language, and Society' (May 2022), pp. 5-6. Available here: https://ssrn.com/abstract=4101805 or http://dx.doi.org/10.2139/ssrn.4101805

7 This is obvious from the Explanatory Memorandum attached to the proposal (n 2), p. 13, which notes that 'parenthood' is also referred to as 'filiation'.

8 Explanatory Memorandum attached to the proposal (n 2), p. 13.

1.4.2. 'Child'

Article 4.2. provides that for the purposes of the proposed Regulation, **'"child" means a person of any age whose parenthood is to be established, recognised or proved'**. Accordingly, the proposal includes within its scope the parenthood of both minors and adults.

It is important to understand that **although the emphasis has been on the cross-border *recognition* of parenthood, the proposed Regulation applies to both the *establishment* and the recognition of parenthood *in cross-border situations***. This is because, as explained in recital 36 of the proposal, '[i]n order to facilitate the recognition of court decisions and authentic instruments on parenthood matters, this Regulation should lay down uniform jurisdiction rules for the establishment of parenthood with a cross-border element'. Accordingly, it is important to bear in mind the meaning attributed to each of the above terms, for the purposes of the proposal:

1.4.3. 'Establishment of parenthood'

Article 4.3. of the proposal defines 'establishment of parenthood' as '**the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting a parenthood established previously'**. Recital 33 of the proposal adopts the above definition and adds that '[w]here relevant, this Regulation should also apply to the extinction or termination of parenthood'.

1.4.4. 'Recognition of parenthood'

The proposal does not specifically define the term 'recognition of parenthood', however, it is clear that this **entails the legal recognition of the parent-child relationship, as this was *already* validly established under the laws of another Member State**. The Commission has explained that '[t]he recognition in a Member State of court decisions given in another Member State, and of authentic instruments establishing parenthood with binding legal effect in the Member State of origin, should be **based on the principle of mutual trust** in one another's justice system'.[9]

1.4.5. 'Cross-border situations'

As noted in Article 5 of the proposal, the proposed Regulation 'shall not affect the competence of the authorities of the Member States to deal with parenthood matters'. Recital 25 sheds further light on this by clarifying that Member State competence to deal with parenthood matters is not affected by the proposed Regulation in purely domestic situations where there are no cross-border elements: '[…] This Regulation should not therefore include provisions on jurisdiction or applicable law for the establishment of parenthood in domestic cases, such as the parenthood of a child further to a domestic adoption in a Member State'. Hence, **with regard to the establishment of parenthood, the Regulation only applies for determining the jurisdiction and/or applicable law rules in situations where there is a cross-border element**, that is, when the situation presents points of contact with more than one Member State. **The recognition by a Member State of parenthood established in another Member State by nature involves a situation that presents points of contact with more than one Member State and hence constitutes a cross-border situation**. However, as will be seen in more detail in chapter 6 of the study, **the proposed Regulation does not apply to situations where**

[9] Explanatory Memorandum attached to the proposal (n 2), p. 15.

the recognition that is sought in a Member State is that of parenthood established in a third country.[10]

1.5. Structure

The study will be structured as follows. Chapter 2 will **present the problem** of non-recognition of parenthood between EU Member States and will **explain what its causes are**. Chapter 3 will analyse the **existing legal framework** (at EU and international level) in order to identify the solutions it currently offers (and may potentially offer) to the problem of lack of cross-border recognition of parenthood in the EU. Chapter 4 will then present the **background of the initiative and the steps taken by the Commission in preparation of the proposal**, while chapter 5 will provide a **detailed explanation of the proposal**. Chapter 6 will, then, offer a **critical analysis of the proposal**, by addressing its contributions and advantages as well as the gaps that it leaves and the challenges that may ensue during the process of its approval by the Council. The study will attempt to provide **recommendations for improving the proposal and for responding to the challenges that may ensue**, which will be noted in chapter 7.

[10] This is noted explicitly in Article 3(3) of the proposal.

2. THE PROBLEM OF NON-RECOGNITION OF PARENTHOOD BETWEEN EU MEMBER STATES AND ITS CAUSES

KEY FINDINGS

- The problem of non-recognition of parenthood in the EU is a problem that is **mostly faced by 'alternative families'**.
- In some Member States, it will **not be possible to legally establish the filiation** between a child and both parents if they constitute an 'alternative family'.
- **Some Member States also refuse to recognise the parent-child relationship** between a child and both parents which was **already validly established in another Member State**, because the procedure that the parents have chosen for bringing the child to the world or the familial constellation that has ensued is socially and/or legally objectionable in that Member State. This results in children having either **limping filiation statuses in that they are legally considered as the children of their parents in one Member State but they are not legally recognised as such in another, or experiencing uncertainty** as to their legal parenthood in situations where there is a connection with two or more Member States.
- In some cases, parenthood can be recognised by a Member State but only after **lengthy, costly, and, thus, burdensome procedures**.
- There are **three types of reasons** behind the refusal of Member States to recognise parenthood already established abroad: **a) an objection to the type of family constellation that has ensued following the birth of a child; b) an objection to the way that the child was conceived or born; and c) administrative or other non-principled grounds**.
- **Family law remains** an area that falls within **Member State competence**, **however** Article **81(3) TFEU gives competence to the EU** to adopt measures on **aspects of family law with cross-border implications**. Moreover, **cross-border situations that involve family law issues fall within the scope of EU law** and thus in those situations Member States must comply with their obligations under EU law. Accordingly, Member States have full control over issues of parenthood merely in purely domestic situations that lack a cross-border element.
- The **problem of non-recognition** of parenthood in a cross-border context **arises** as a result of the fact that Member States have **a) different substantive family law rules** regarding the establishment and recognition of parenthood *and* **b) different private international law rules** regarding the establishment and recognition of parenthood.
- Currently, **EU law does not provide a wholesome solution** to the problem of non-recognition of parenthood.

2.1. Introduction

The aim of this chapter is to present the problem of non-recognition of parenthood between EU Member States and its causes. The chapter will begin (section 2.2.) by presenting the problem of non-recognition of parenthood within the EU. It will be explained that this is a problem that is mostly faced by – so-called – 'alternative families', which do not fit the nuclear family model. It will be seen that different Member States have different approaches to the establishment and recognition of parenthood in their territory: thus, in certain Member States, families will simply be unable to legally *establish* the parent-child relationship between a child and one or (even) both parents, whilst problems

with the cross-border *recognition* of parenthood already validly established under the law of another Member State may, also, ensue. The latter problem (of non-recognition) is particularly pertinent in the EU context when families exercise their EU free movement rights. The subsequent section (section 2.3.) will aim to demonstrate this latter problem in practice, using real-life examples drawn from petitions submitted to the PETI committee of the European Parliament, CJEU case-law, as well as examples mentioned by the Commission in its Impact Assessment report.[11] The chapter will conclude with a section (section 2.4.) exploring the causes of the problem of the non-recognition of parenthood in the EU.

2.2. The problem of non-recognition of parenthood between EU Member States

For many human beings, becoming a parent constitutes the absolute fulfilment. **Historically, the issue of who were a child's parents was, in most instances, settled and, thus, there was overall uniformity in the laws of different States regarding the issue of parenthood. However, uncertainty has arisen in the last few decades, as a result of a combination of changing family patters and advances in medical science**: States' approaches to issues such as paternity disestablishment, ART, surrogacy arrangements, and parenthood by same-sex couples, have varied greatly and, thus, there is **no international consensus** on whether legal parenthood can be established in such circumstances and whether – once established – it should be recognised across borders.[12]

Most opposite-sex couples are able to conceive a child naturally and once born, if the couple is married, the child will automatically be legally recognised as the joint child of the couple. Such families comprised of a married opposite-sex couple and their genetically-related child(ren) make up the, so-called, **'nuclear family model'**, which **has traditionally constituted the family formation the law has protected and recognised**.[13]

However, **'alternative families' not fitting the nuclear family model have always existed and, in recent years, have become more visible**.[14] Such 'alternative families' include single-parent families, rainbow families, reconstituted families, families consisting of more than two adults who together

[11] Commission Staff Working Document 'Impact Assessment Report' accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, SWD(2022) 391 final (the 'Impact Assessment report'). The document is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022SC0391&qid=1670842746404.

[12] D. A. J. G. de Groot, *The Many Faces of Civil Status Recognition: A legal analysis in the light of EU citizenship and the case law of the European Court of Justice and the European Court of Human Rights*, PhD Thesis, University of Bern, 2021, p. 364.

[13] For an explanation of the nuclear family model see the entry 'Nuclear Family' by T. Nielson in the SAGE Encyclopedia of Marriage, Family, and Couples Counseling (Sage, 2017). For academic analyses which argue that the nuclear family model is still the model that underpins the law both at national level and at EU level see, inter alia, A. Brown, *What is the Family of Law? The Influence of the Nuclear Family* (Hart, 2019); A. Tryfonidou, 'What is a "Family" in EU law: Do EU policies sufficiently address family diversity and its consequences?' in M-L. Öberg and A. Tryfonidou (eds), *The Family in EU law* (Cambridge University Press, forthcoming).

[14] ICF S.A. Final Report 'Study to support the preparation of an impact assessment on a possible Union legislative initiative on the recognition of parenthood between Member States', March 2022, available here: https://commission.europa.eu/system/files/2023-01/ICF%20Final%20Report%20-%20Recognition%20of%20parenthood%20between%20MSs%20-%20FINAL.pdf, pp. 10-11. For an analysis of the development of the concept of the 'family' in international instruments see F. Banda and J. Eekelaar, 'International Conceptions of the Family' (2017) 66 International and Comparative Law Quarterly 833.

parent their (biological and non-biological) children, as well as couples who are unable to naturally conceive a child and have either adopted a child or have had to resort to ART to become parents.[15]

As is obvious from (mostly recent) case-law,[16] **the EU has already begun to acknowledge this changing landscape of family life in its law and policy**.[17] **This is also the case in *some* Member States** that afford legal recognition to some or all types of alternative families mentioned above. **However, there are still a number of Member States that grant no, or only limited, legal recognition to alternative families**. In the latter Member States, therefore, the dream of becoming a parent often turns into a nightmare, because the child that has joined the family may not be legally recognised as the child of both parents and thus may remain – legally – a stranger to one or, sometimes even, both parents. **This can be because the procedure that the parents have chosen for bringing the child to the world (for example, surrogacy) or the familial constellation that has ensued (for example, a rainbow family) is socially and/or legally objectionable in that Member State**.

Parenthood is a civil status,[18] **which is central to a person's identity and from which many important rights and obligations are derived**. Each Member State has developed its own concept of civil status, taking into account its history, culture, and legal system. Parenthood is legally established by operation of law (by birth and by legal presumption) or by an act of a competent authority such as through a court or administrative decision, by a notarial deed, or by registration.[19] The establishment of the parenthood of a child and the issuance of the civil status or judicial documents attesting this are, in most situations, required in order for the family to access certain public services or entitlements or to obtain social benefits such as family allowances and tax deductions. Accordingly, **being unable to establish in law the parenthood of a child can have severe practical, in addition to psychological, repercussions for a family.**

A family can also suffer severe negative consequences if parenthood established under the legal system of one State is not *recognised* under the legal system of another State.[20] **Such problems of non-recognition are particularly pertinent in the EU context when families exercise their EU free movement rights.**[21] In such situations, it can happen that whilst the family is already legally

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15 See L. Hodson, 'Ties That bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR' (2012) 20 International Journal of Children's Rights 501, 502; L. Carlson, L. Sz. Oláh and B. Hobson, 'Policy Recommendations: Changing Families and sustainable societies: Policy contexts and diversity over the life course and across generations' (Collaborative research project financed by the European Union's Seventh Framework Programme 2013-2017 (Grant no. 320116, FP7-SSH-2012-1) (2017) available at www.familiesandsocieties.eu/wp-content/uploads/2017/06/WorkingPaper78.pdf.

16 See, for instance, Case C-413/99, *Baumbast and R* ECLI:EU:C:2002:493 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CJ0413); Case C-673/16, *Coman* ECLI:EU:C:2018:385 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0673); Case C-490/20, *V.M.A.* ECLI:EU:C:2021:1008 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CA0490&qid=1679046704245); Case C-2/21, *K.S.* ECLI:EU:C:2022:502 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CO0002&qid=1679047845143) and Case C-129/18, *SM* ECLI:EU:C:2019:248 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0129&qid=1679047883081).

17 A. Tryfonidou (n 13).

18 According to de Groot, '[t]he civil status is the legal framework that classifies the identity of a person and their relations with others' – D. A. J. G. de Groot (n 12), p. 4. For a detailed analysis of the definition of civil status and the various categories of civil status see chapter 2 of the same thesis.

19 D. A. J. G. de Groot (n 12), pp. 366-371.

20 For an analysis of the psychological impact that non-recognition (or recognition following time-consuming and burdensome procedures) may have see ICF S.A. Final Report (n 14), p. 42 (see, also, the references in the relevant section).

21 The right to freedom of movement and residence is granted to all Union citizens (i.e. all Member State nationals) by the (so-called) free movement of persons provisions, which are currently found in the TFEU: Article 21 TFEU (the general, catch-all, provision that grants the right to all Union citizens); Article 45 TFEU (which grants the right to workers); Article 49 TFEU

recognised as a family in the Member State of origin where filiation between the child and both parents has been legally established, when it moves to the host Member State the familial ties among (some or all of) its members will cease to exist in law. As explained by the Commission in its IIA, the problem is essentially that 'families that travel within the Union or take up residence in another Member State may see the parenthood of their children not recognised. This may happen, for example, where the parenthood of a child is established by operation of law or where a child is adopted domestically by two parents, by the partner of the biological parent or by one single parent. Citizens have reported to the Commission and the European Parliament difficulties to travel or move within the Union with their children as a result of the existence of different Member States' rules on the establishment and recognition of parenthood'.[22] Thus, a judgment establishing parenthood, properly obtained from a court in one Member State may become a worthless piece of paper in another, and this can be the fate also of authentic instruments establishing – or evidencing – parenthood issued by the authorities of a Member State. **This results in children having either limping filiation statuses** in that they are legally considered as the children of their parents in one Member State but they are not legally recognised as such in another, **or experiencing uncertainty as to their legal parenthood in situations where they move – or intend to move – between two or more Member States or, more broadly, when their situation presents points of contact with more than one Member State**.

In the Explanatory Memorandum accompanying the proposal under examination in this study, it is noted that '**an estimated 2 million children may currently face a situation in which the recognition of their parenthood as established in one Member State is not recognised for all purposes in another Member State**'.[23] **This number is bound to rise** given 'the increasing number of mobile citizens' and the fact that 'people tend to have children later and ART becomes increasingly necessary'.[24] As has been noted in the External Contractor's Report drafted to support the preparation of the Commission's Impact Assessment report on the proposal, '[t]he groups of children disproportionately affected by the problems identified [i.e. problems of non-recognition of parenthood] are: **children born to unmarried parents, children of rainbow families, and children born through surrogacy**'.[25]

The severance – in law – of the familial ties between a child and one or both parents can have far-reaching legal consequences for all involved. These have been perfectly summarised by the Commission in its IIA: 'The non-recognition of an established parenthood can lead to **a parent losing parental rights to act as the legal representative of the child** in matters such as enrolling the child in school, opening a bank account on behalf of the child, giving consent for medical treatment of the child, obtaining documentation necessary for the child to prove a Member State's nationality and therefore Union citizenship through a passport or an identity card; **to the child losing their entitlements to maintenance rights, succession rights, custody or visiting rights by one of their parents or rights associated with having a sibling legal relationship** (for example, the right to be enrolled in the same school); or **to the child not benefiting from family allowances granted to parents or from parental leave rights**. This **may lead parents to start litigation to have their parenthood over the child recognised in another Member State**, with the significant time, costs

(which grants the right to the self-employed); and Article 56 TFEU (which grants the right to service-providers and service-recipients).

[22] IIA Ref. Ares(2021)2519673 – 14/04/2021 available here: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12878-Cross-border-family-situations-recognition-of-parenthood_en.

[23] Explanatory Memorandum to the proposal (n 2), p. 2.

[24] ICF S.A. Final Report (n 14), p. 45.

[25] ICF S.A. Final Report (n 14), p. 34. See, also, p. 36 of the same Report.

and burden that this represents. **Ultimately, the consequence of the lack of recognition of the parenthood of a child in another Member State may be the obstruction of the right to free movement of a child with their parent(s) or the deterrence of parents from exercising their right to free movement with their child for fear that an established parenthood will not be recognised if travelling within the Union or taking up residence in another Member State**'.[26,27] In its Impact Assessment report, the Commission also provided a more detailed account of the consequences of the non-recognition of parenthood, drawing on a selection from the replies received by it from the public and academia.[28]

It should be noted, here, that **the problem of non-recognition of parenthood can be encountered when a family moves to the territory of another Member State** for the purpose of settling there**, when a family returns to its Member State of origin** after having resided in the territory of another Member State**,** as well as **when a family simply travels to a Member State** and, thus, stays in its territory for only a limited period of time. In the latter case, recognition may be needed in order, for instance, to ensure that all members of the family can travel to the host Member State together or, in case of a medical emergency, that both parents can make medical decisions concerning the child.

In addition to the problem of complete non-recognition of parenthood, **another problem, albeit a lesser one, is that in some cases parenthood can be recognised by a Member State but only after lengthy, costly, and, thus, burdensome procedures**,[29] which may also constitute an obstacle to free movement within the EU and a violation of a number of fundamental rights stemming from EU law.[30]

As pointed out by the Commission in its Impact Assessment report, **the problem** to be addressed through this initiative on parenthood, therefore, **'is the non-recognition in a Member State of parenthood established in another Member State. It may result in one of two outcomes: (i) after initial non-recognition of parenthood, parenthood is eventually recognised but only after lengthy, costly and burdensome procedures; and (ii) parenthood is not recognised in the end (possibly despite lengthy, costly and burdensome procedures)**. This second outcome is more serious, since it entails that the child is placed in the undesirable state of a limping parenthood in another Member State for an indeterminate period. Under both scenarios, families face legal uncertainty as to whether or not their child's parenthood will be recognised in another Member State'.[31] As the Commission has noted in the same document, **'[t]he preservation of the parent-child link in cross-border situations is […] essential for protecting the fundamental rights of children and their families** (including the right for respect of private and family life, right to non-discrimination and rights of the child, such as the protection of the best interests of children and the right to maintain on a regular basis a personal relationship and direct contact with their parents).'[32] Accordingly, it comes as no surprise that the problem of the non-recognition of parenthood in the EU to which the Commission has turned its focus in the last couple of years with the preparation of this initiative, has concerned EU institutions for more than a decade now.

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[26] (n 22). See, also, the Commission's Impact Assessment report (n 11), pp. 11-16.

[27] For a detailed analysis of the impact that the non-recognition of parenthood in a cross-border context can have on the exercise of free movement rights under EU law see A. Tryfonidou, 'EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?' (2019) 38 Yearbook of European Law 220.

[28] Impact Assessment report (n 11), pp. 98-102.

[29] ICF S.A. Final Report (n 14), p. 14.

[30] ICF S.A. Final Report (n 14), pp. 18-19.

[31] Impact Assessment report (n 11), pp. 10-11.

[32] Impact Assessment report (n 11), p. 1.

2.3. The problem in practice

In this section of the chapter, **the problem of non-recognition by a Member State of parenthood established in another Member State will be demonstrated with examples from real life**. For this purpose we shall consider a) the petitions submitted to the PETI committee of the European Parliament raising this issue, b) the facts of the two cases that have been referred to the CJEU to date and which concerned refusals of cross-border recognition of parenthood already established in the territory of another Member State, and c) some of the examples of non-recognition, which have been mentioned by the Commission in its Impact Assessment report on this initiative.[33] Additional examples of cross-border problems with the recognition of parenthood can be seen in a document prepared by the HCCH.[34]

Before proceeding to view the problem in practice, we should quote the part of **the report drawn up by the External Contractor** with the aim of supporting the Commission in the preparation of its Impact Assessment report**, which summarises the responses of national ministries** regarding the types of problems of non-recognition of parenthood that families may encounter within the EU:[35]

> 'According to ministry representatives**, the main practical problems** that arise in connection with the recognition of parenthood established abroad **are related to the recognition of parenthood of same-sex parents and the recognition of parenthood established abroad following surrogacy**. **Practical problems were also indicated in relation to the formal requirements for documents** (e.g. legalisation and translation needed), **the cases where the father of the child is considered to be the mother's husband and** the **requirement for consent of the other parent** (often the mother) to recognition. Other problems include:
>
> - The deprivation by one parent of the other's right to see their child, in cases where parenthood is awarded to only one parent abroad;
> - The differences between countries in drawing up birth certificates (e.g. where the origin of one parent is not established, but one Member State provides for fictitious entry of a parent but others do not);
> - Receiving the relevant documents for entering the parenthood in the registry;
> - Recognition of court decisions issued abroad;
> - Existence of more than one father or mother of the child on a foreign certificate of parenthood;
> - Impossibility of obtaining certain documents in the context of adoption proceedings.'

When considering the problems of non-recognition encountered by families in a cross-border context, it should be borne in mind – as pointed out by the Commission in its Impact Assessment report – **that there is limited availability of actual data on the non-recognition of parenthood**: 'the numbers of cross-border families affected by the existing problems had to be **estimated** based on several assumptions. The estimations were complicated by the fact that certain data is not collected at EU level either at all (such as the data concerning surrogacy arrangements) or not systematically given the sensitivity of the subject matter and data protection considerations (information concerning sexual

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[33] For a summary of the feedback received during the meeting with the stakeholders see the Commission's Impact Assessment report (n 11), pp. 94-97.

[34] HCCH Background Note for the Meeting of the Experts' Group on the Parentage/Surrogacy Project drawn up by the Permanent Bureau, Annex 1 (January 2016). The document is available here: https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf.

[35] ICF S.A. Final Report (n 14), p. 122.

orientation of persons and consequently data concerning rainbow families). Representative data thus cannot be obtained. Moreover, the fact that most of the processes leading to the recognition of parenthood take place before local administrative authorities of Member States further complicated the collection of data. Indeed, while many Member States record statistical data concerning judicial proceedings, this is usually not done for administrative proceedings.'[36] Accordingly, **although qualitative data can be collected regarding the problem of non-recognition faced by families in cross-border situations within the EU, it is not possible to collect *precise* quantitative data which demonstrates the full extent of the problem in exact numerical terms**.

2.3.1. Petitions to the PETI committee of the European Parliament

The problems faced by families in a cross-border context have been highlighted in a number of petitions submitted to the European Parliament,[37] the vast majority of which involved rainbow families.[38] As noted by the Commission in its Impact Assessment report on the proposal, these petitions (and letters addressed to EU institutions concerning refusals of recognition of parenthood) 'are only a tip of the iceberg as regards problems with the recognition of parenthood across the EU, as arguably not all families would resort to using them'.[39] As will be seen, **the petitions demonstrate that there are three different types of reasons behind the refusal of Member States to recognise parenthood already established abroad:** a) an **objection to the type of family constellation** that has ensued following the birth of a child, the main example here being rainbow families; b) an **objection to the way that the child was conceived or born**, with the main example here being families comprised of surrogate-born children and their intended parents; and c) **administrative or other non-principled grounds**.

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[36] Impact Assessment report (n 11), pp. 50-51.

[37] The right to petition the European Parliament found its way in primary EU law in 1993, when the Treaty of Maastricht came into force. This right is, currently, provided in Article 227 TFEU, which provides that 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly'. The right to petition the European Parliament also features in Article 44 of the Charter of Fundamental Rights of the EU [2012] OJ C 326/391 (the full text of the Charter is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT). Petitions can be submitted electronically or in paper format and – as noted in the relevant webpage (https://www.europarl.europa.eu/petitions/en/home) – they allow 'Parliament, through its Petitions Committee, to conduct an ongoing reality check on the way in which European legislation is implemented and measure the extent to which the European institutions are responding to' people's concerns. Many petitions are debated in Petitions Committee meetings with the active participation of petitioners and the objective of the Committee is to provide a response to all petitions. For a critical evaluation of the right to petition the European Parliament see N. Vogiatzis, 'The Past and Future of the Right to Petition the European Parliament' (2021) 40 Yearbook of European Law 82.

[38] NELFA has also prepared a collection of cases involving refusals of recognition of parenthood validly established abroad in situations involving rainbow families – the document is available here: http://nelfa.org/inprogress/wp-content/uploads/2020/01/NELFA-fomcasesdoc-2020-1.pdf. The problems faced by rainbow families who exercise their free movement rights within the EU have also been analysed extensively in the study 'Obstacles to the Free Movement of Rainbow Families in the EU', requested by the PETI Committee of the European Parliament, March 2021, available at https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)671505. The study was presented at the Workshop on LGBTI+ Rights in the EU organised by the Policy Department for Citizens' Rights and Constitutional Affairs on the Request of the PETI committee (March 2021). Details regarding the Workshop are available here: https://www.europarl.europa.eu/committees/en/workshop-on-lgbti+-rights-in-the-eu/product-details/20210303WKS03281 and the webstreaming of the Workshop is available here: https://multimedia.europarl.europa.eu/en/webstreaming/peti-committee-meeting_20210322-1345-COMMITTEE-PETI.

[39] Impact Assessment report (n 11), p. 6 (footnote 39).

One of the first petitions that was submitted regarding non-recognition of parenthood is **Petition 0513/2016**.[40] Eleni Maravelia, who is a Greek national, is married to a British woman, and the **couple** are **resident in Spain**. The couple had their **first daughter in Spain in 2014** and the **Spanish birth certificate notes both women as the mothers of the child**. Nonetheless, **outside of Spain and, in particular, in the States of nationality of the two women, the three of them are not considered as a family**: although the non-recognition in the UK was due to an administrative issue, in Greece, only the birth mother was recognised as the parent of the child due to the fact that under Greek law two persons of the same sex cannot be the joint legal parents of a child. As noted in the petition summary, 'The petitioner believes that families like hers are being refused their right to free movement and their children are vulnerable, since their parents are not equally recognised across the EU. The petitioner urges that the E[uropean] P[arliament] and the Commission work towards making official civil status documents, such as birth certificates, to be accepted de facto across the Member States. She believes that the children of parents in similar situation deserve the same rights as all the children, with both their parents recognised'.

The more recent **Petition 1179/2020** did not simply concern the **cross-border legal recognition of parenthood in a context involving a rainbow family**, but was further complicated by the fact that the two children of the family were born through surrogacy, which is a highly controversial method of ART.[41] The petitioner – Dan Sobowitz – is married to another man. At the time that the petition was submitted, the **couple lived in Germany**. In 2019, the couple **became fathers to two children who were born through surrogacy in the USA**. **An American Court** established the filiation of the children by recognising the two men as the two sole parents of the children, and the **USA birth certificates** of the children **note the two men as their sole parents**. The **couple successfully submitted a request to a French court to recognise and reaffirm the USA court order**. Nonetheless, and despite the fact that the couple are recognised as the legal parents of the children in at least one Member State, **they are not certain that the familial ties between them and their children will be legally recognised everywhere in the EU**: as noted in the petition summary, the petitioner and his partner 'deplore that same-sex parented families do not have the same rights across the European Union. In their opinion, the lack of common rules across the EU violates their rights to move and reside freely within the territory of the EU Member States, to respect for private and family life, to be protected from discrimination on the ground of sexual orientation as well as their children's right to be protected from discrimination on the ground of sexual orientation by association with their gay parents. The petitioners, therefore, call on the European Parliament and the European Commission to put forward proposals for EU legislation aimed at providing concrete solutions for rainbow families'.

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[40] Petition No. 0513/2016 by Eleni Maravelia (Greek) on the non-recognition of LGBT families in the European Union (https://www.europarl.europa.eu/petitions/en/petition/content/0513%252F2016/html/missinglink). See, also, Petition No. 0214/2021 by C.P. (Greek) on the protection of LGBT families' rights on the free movement within the EU (https://www.europarl.europa.eu/petitions/en/petition/content/0214%252F2021/html/Petition-No-0214%252F2021-by-C.P.-%2528Greek%2529-on-the-protection-of-LGBT-families%25E2%2580%2599-rights-on-the-free-movement-within-the-EU).

[41] Petition No. 1179/2020 by Dan Sobovitz (Hungarian) bearing 2 signatures, on the protection of the right of rainbow families to free movement within the EU (https://www.europarl.europa.eu/petitions/en/petition/content/1179%252F2020/html/Petition-No-1179%252F2020-by-Dan-Sobovitz-%2528Hungarian%2529-bearing-2%25C2%25A0signatures%252C-on-the-protection-of-the-right-of-rainbow-families-to-free-movement-within-the-EU).

Petition 0712/2020 was also submitted by **a man** – a Spanish national – **married to another man** (a Polish national) who **became fathers to two children through surrogacy**.[42] The children were issued with **Spanish birth certificates indicating both men as their parents, yet in Poland the children were unable to apply for Polish passports, as under Polish law the Polish father is not recognised as the second parent and thus the children cannot acquire Polish citizenship through him**. The petition summary notes that the 'petitioner urges the E[uropean] P[arliament] and the Commission to work towards the de facto recognition of official civil status documents, such as birth certificates, across all Member States. The petitioner believes that the children of parents in similar situations deserve the same rights as all other children, with both of their parents being recognised'.

Petition 0657/2020 focused on the obstacles to the exercise of EU free movement rights that the non-recognition of parenthood in a cross-border context can give rise to.[43] In the petition summary, it was noted that the 'refusal of a host Member State to legally recognise the family ties of an LGBT family **could restrict freedom of movement in two ways**: **denial of family reunification rights** and **denial of a series of rights (such as social and tax benefits), to which the family would have been entitled if the legal ties between its members had been recognised**.'[44] In other words, the refusal of a Member State to legally recognise the relationship between a child and a parent that was legally established in another Member State can result in a denial of the family's right to move *together* but also more broadly, of the 'legal effects' of parenthood, that is, of all the rights and obligations deriving from legal parenthood.

The **non-recognition** of the legal ties between a child and one of the parents in some Member States **can, in cases where the relationship between the parents has broken down, be (ab)used by the parent who enjoys cross-border recognition, in order to exclude the non-recognised parent from the life of the child**. An example of this can be seen in **Petition 1038/20**, which was submitted by NELFA on behalf of a Danish woman (Janet) who is the mother of a child together with her former wife who is a Bulgarian national.[45] Shortly after his birth in Denmark, the child was issued with a Danish birth certificate that states both women as his mothers. Following the divorce of the two women, the Bulgarian mother of the child applied to the Bulgarian authorities for a new birth certificate for the child: the certificate issued notes only the Bulgarian mother as the mother of the child, whilst it leaves the second space (which is for the 'father' of the child) blank, given that in Bulgaria two women cannot

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42 Petition No. 0712/2020 by R.A.P. (Spanish) on the fundamental rights of rainbow families and free movement within the EU (https://www.europarl.europa.eu/petitions/en/petition/content/0712%252F2020/html/Petition-No-0712%252F2020-by-R.A.P.-%2528Spanish%2529-on-the-fundamental-rights-of-rainbow-families-and-free-movement-within-the-EU).

43 Petition No. 0657/2020 by Catalina Pallàs Pico (Spanish), on behalf of the Association of LGBTI Families of Catalonia, on the right of free movement for LGBTI families in the EU (https://www.europarl.europa.eu/petitions/en/petition/content/0657%252F2020/html/Petition-No-0657%252F2020-by-Catalina-Pall%25C3%25A0s-Pic%25C3%25B3-%2528Spanish%2529%252C-on-behalf-of-the-Association-of-LGBTI-Families-of-Catalonia%252C-on-the-right-of-fre).

44 Petition No. 1056/2020 by Emiel Höjdefors Kjälled (Swedish), on behalf of The Anti-Discrimination Bureau Stockholm South and The Anti-Discrimination Bureau Uppsala, bearing 2 signatures, on the restrictions of the rights of LGBTQ families in Sweden and the alleged discrimination against them (https://www.europarl.europa.eu/petitions/en/petition/content/1056%252F2020/html/Petition-No-1056%252F2020-by-Emiel-H%25C3%25B6jdefors-Kj%25C3%25A4lled-%2528Swedish%2529%252C-on-behalf-of-The-Anti-Discrimination-Bureau-Stockholm-South-and-The-Anti-Discrimination-Bureau-Uppsala%252C-bearing-2%25C2%25A0signatures%252C-on-the-restrictions-of-the-rights-of-LGBTQ-families-in-Sweden-and-the-alleged-discrimination-against-them).

45 Petition No. 1038/2020 by Björn Sieverding (German), on behalf of the Network of European LGBTIQ* Families Associations, signed by one other person, on the mutual recognition of legal guardians in LGBTIQ families in the EU (https://www.europarl.europa.eu/petitions/en/petition/content/1038%252F2020/html/Petition-1038%252F2020-by-Bj%25C3%25B6rn-Sieverding-%2528German%2529%252C-on-behalf-of-the-Network-of-European-LGBTIQ*-Families-Associations%252C-signed-by-one-other-person%25).

be considered the joint legal parents of a child. Accordingly, in Bulgaria Janet is not recognised as the mother of her son, despite the fact that she is legally recognised as his mother in Denmark. Once she received the Bulgarian passport for the child, the Bulgarian mother moved with the boy to Bulgaria, without the permission and knowledge of Janet. The petitioner considers that **this situation of non-recognition and loss of parenthood as a result of the mere crossing of a border within the EU, amounts to an infringement of the EU free movement of persons provisions and of fundamental rights protected as a matter of EU law**. Moreover, in the petition it was noted that **the existence of two birth certificates issued by different Member States with different content creates uncertainty** as it is not obvious which one of the two birth certificates should be recognised by a third EU Member State.[46]

In a petition which is now closed – **Petition 1430/2013** – it is demonstrated that **difficulties can emerge** not only from refusals to recognise civil status documents or court rulings that establish or evidence the establishment of parenthood, but also **from refusals of recognition of documents or court rulings evidencing the termination (or non-existence) of parenthood**. The petition was submitted by a divorced woman who wished to be registered in Romania as the single parent of her child. Nonetheless, she was unable to do so as a result of the refusal of the Romanian courts to recognise a denial of paternity ruling handed down by a German court, which was required in order to remove the name of the father from the Romanian birth certificate.[47]

Finally, we should mention **Petition 0911/2020**, which involved the **non-recognition of the parent-child relationship between an adult child and his parent for inclusion in the father's death certificate**.[48] In this case, the petitioner and his parent immigrated to Sweden from Poland in the 1980s. In May 2020, the petitioner's father passed away. The petitioner requested the Swedish Tax Agency (STA) to issue a certificate for the death of his father. However, **the death certificate** that was issued **did not declare that the petitioner was the deceased's son because the Swedish authorities never registered the family relationship between him and his parents**. The petitioner obtained a birth certificate from the Civil Registry Office in Poland. However, **the STA refused to accept the Polish birth certificate** as proof for the family relationship between the petitioner and his father, **on the ground that it was not possible to check the data with his father** because he was already dead. The Commission replied that Regulation 2016/1191[49] does not cover the refusal of the Swedish authorities to recognise the legal effects of a birth certificate (as it merely simplifies the administrative formalities for the recognition of documents) and that **currently EU law cannot provide a solution to the issue**

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[46] One could also argue that the existence of different filiation statuses in different Member States gives rise to 'serious inconvenience' for the persons concerned which can constitute an obstacle to the exercise of free movement rights, in the same manner that the CJEU held that this is the case in its jurisprudence involving discrepancies in surnames in different Member States – see, for instance, Case C-148/02, *Garcia Avello* ECLI:EU:C:2003:539, para. 36 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0148&qid=1679048588398) and Case C-353/06, *Grunkin Paul* ECLI:EU:C:2008:559, para. 24 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62006CJ0353&qid=1679048741420).

[47] Petition No. 1430/2013 by Doriana Jahn (German) on a birth certificate for her daughter, who was born in Romania (closed) (https://www.europarl.europa.eu/petitions/en/petition/content/1430%252F2013/html/Petition-1430%252F2013-by-Doriana-Jahn-%2528German%2529-on-a-birth-certificate-for-her-daughter%252C-who-was-born-in-Romania).

[48] Petition No. 0911/2020 by A.S. (Swedish) on the recognition of a birth certificate in another EU Member State (https://www.europarl.europa.eu/petitions/en/petition/content/0911%252F2020/html/Petition-No-0911%252F2020-by-A.S.-%2528Swedish%2529-on-the-recognition-of-a-birth-certificate-in-another-EU-Member-State).

[49] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012 [2016] OJ L 200/1. The full text of the Regulation is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32016R1191.

of non-recognition of the *contents* of a birth certificate, as this is a matter that is governed by Member States' national law.

2.3.2. CJEU Cases

The problem of non-recognition of the parent-child relationship in situations where a family has moved within the EU has reached the CJEU in recent years through two references for a preliminary ruling. Both references involved a **refusal of recognition based** on an **objection** – of the Member State concerned **– to the family constellation** that sought recognition on the facts of the case, namely, a rainbow family.[50]

a. The *V.M.A.* case

In 2020, the CJEU received, for the first time, a **reference for a preliminary ruling concerning the problem of non-recognition of the parent-child relationship between a child and one of her same-sex parents, in a case where that relationship had been legally established in the Member State of residence of the family.**[51] The request was made in proceedings between V.M.A. and the Sofia municipality, concerning the latter's refusal to issue a birth certificate in respect of S.D.K.A., the daughter of V.M.A. The latter is a Bulgarian woman married to K.D.K, a British woman. The couple have resided in Spain since 2015. In 2019, V.M.A. and K.D.K. had a daughter, S.D.K.A., who was born and resides with both parents in Spain. The daughter's birth certificate, issued by the Spanish authorities, refers to V.M.A. as 'Mother A' and to K.D.K. as 'Mother' of the child. In early 2020, V.M.A. applied to the Sofia municipality for a birth certificate for S.D.K.A., in order for the child to be able to acquire a Bulgarian identity document. The Sofia municipality replied by requesting V.M.A. to provide evidence of the parenthood of S.D.K.A. with respect to the identity of her biological mother,[52] given that the model civil status document in Bulgaria has only one box for the 'mother' and another for the 'father' and hence only the name of one woman can be noted on a Bulgarian birth certificate. Following V.M.A.'s reply that she was not required to provide the information requested, the Sofia municipality refused V.M.A.'s application for a birth certificate for S.D.K.A. due to the lack of information concerning the identity of the child's biological mother and the fact that a reference to two female parents on a birth certificate is contrary to the public policy of Bulgaria. V.M.A. brought an action against the municipality's refusal before the Administrative Court of Sofia which, in turn, made a reference for a preliminary ruling to the CJEU asking, essentially, whether the contested refusal amounted to a breach of EU law. The Court's ruling in this case will be analysed in chapter 3 of the study, which will explore the solutions currently offered by the existing legal framework to the problem of non-recognition of parenthood in the EU.

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[50] References for preliminary rulings are governed by Article 267 TFEU, which provides that where a question regarding the interpretation of EU law or the validity of secondary EU legislation is raised before a national court, the latter can stay the proceedings before it and make a reference for a preliminary ruling asking the CJEU to answer the question(s) concerning the validity or interpretation of EU law which have been raised before it. Once the CJEU delivers its ruling, the referring national court can resume the proceedings and deliver a judgment deciding the case before it. It is important to note that CJEU preliminary rulings are binding not only on the referring national court but also all other national courts in the Member States when the same question is raised.

[51] Case C-490/20, *V.M.A.* (n 16).

[52] For an explanation of why the use of the term 'biological mother' (as opposed to 'gestational mother' or 'DNA mother', depending on what the national authorities wished to establish) is confusing see D. A. J. G. de Groot, Special Report 'EU law and the mutual recognition of parenthood between Member States: the case of V.M.A. v Stolichna obshtina', Robert Schuman Centre and Global Citizenship Observatory (2021), p. 3 (available here: https://cadmus.eui.eu/handle/1814/69731).

b. The *K.S.* case

The year after the *V.M.A.* case was referred to the CJEU, but before the ruling in that case was delivered, **another case concerning the cross-border recognition of the parent-child relationship in a rainbow family was referred to the same court**. This was ***K.S.***[53] The reference in this case arose from proceedings between the Commissioner for Human Rights in Poland (Rzecznik Praw Obywatelskich) and the Head of the Civil Registry Office in Krakow, concerning the latter's refusal to transcribe into the Polish register of civil status the birth certificate of the daughter of K.S., a Polish national, and her wife S.V.D., an Irish national, issued by the Spanish authorities. The two women married in 2018, the same year that their daughter, S.R.S.-D., was later born in Spain. The birth of S.R.S.-D. – who is a Polish national – was registered by the Spanish civil registry office on the basis of a joint statement made by the birth mother of the child, K.S., and her wife, S.V.D., and the birth certificate that was issued designates K.S. and S.V.D. as 'Mother A' and 'Mother B', respectively. K.S. and S.V.D. applied for the birth certificate issued by the Spanish authorities for S.R.S.-D. to be transcribed into the Polish register of civil status. However, the application for transcription of the Spanish birth certificate was rejected by the Polish authorities, on the ground that it would be contrary to the fundamental principles of the Polish legal order, in that the parents of the child – as noted in the Spanish birth certificate – were two persons of the same sex. Moreover, the child was refused an identity card on the ground that under Polish law a child may have only a woman and a man as parents. As a result of this, K.S. sent a request for assistance to the Polish Commissioner for Human Rights, stating that S.R.S.-D. had no identity document as the application for a Polish passport for the child had been refused on the ground that her birth certificate had not been transcribed into the Polish register of civil status. The Polish Commissioner for Human Rights then brought an action, on behalf of the two mothers of the child, against the decision of the Polish authorities refusing to transcribe into the Polish register of civil status the birth certificate issued by the Spanish authorities in respect of S.R.S.-D. The court hearing the case decided to make a reference for a preliminary ruling to the CJEU asking, essentially, whether the contested refusal amounted to a breach of EU law. The Court in this case chose to deliver an Order that simply repeated word for word its ruling in *V.M.A.*; as noted above, the latter will be analysed in the next chapter of the study.

2.3.3. Examples mentioned by the Commission in its Impact Assessment report

Various examples of refusals of recognition of parenthood in a cross-border context are also reported in Annex 7 attached to the Commission's Impact Assessment report.[54] Some of these examples are based on complaints submitted by Union citizens to the Commission, others are inspired by the problems described by respondents to the OPC organised by the Commission in 2021 in preparation of the proposal (for more on this see chapter 4 of the study), while others are derived from the facts of court cases. In this part of the chapter, only examples that involve opposite-sex couples are mentioned, since the petitions and the CJEU case-law that were noted earlier in this section have covered many of the problems faced by rainbow families.

The first example mentioned by the Commission involves the issue of **different legal presumptions of parenthood following a divorce**. In this example, a woman was married to a man at the time when she conceived a child with another man. The spouses divorced and the woman married the biological father of the child. The woman and her new husband now live together with the child in Member State A, where the child was born in the course of the woman's new marriage. **Some Member States presume that the husband of the woman at the time when the child was conceived is the father**

[53] Case C-2/21 (n 16).

[54] Impact Assessment report (n 11), pp. 94-98.

of the child; other Member States presume that the mother's new husband is the father of the child or that the new husband can recognise the child as his without recourse to a court. **Given the different legal presumptions, each national law may attribute the paternity of a child to a different man**. As explained by the Commission, in this case, the authorities of Member State A considered the mother's current husband, who is the biological father of the child, as the father of the child, and in the birth certificate issued in that Member State, the child has the last name of the mother's current husband. However, as the child was conceived before the mother was divorced from her previous husband, the authorities of Member State B – which is the mother's country of origin and which presumes that the husband of the woman at the time when the child is conceived is the father of the child – consider that her former husband is the child's father. Hence, **the authorities of Member State B do not recognise the birth certificate issued in Member State A and oblige the child to have the family name of the former husband**. The mother will need to start court proceedings in Member State B and pay for a DNA paternity test proving the paternity of her current husband in order to be able to obtain recognition of the parent-child relationship between her current husband and her child.

The Commission's second example involves the **refusal of recognition of parenthood by an opposite-sex couple that is in a registered partnership**. The child of the couple was born in Member State A. The parents are nationals of Member States B and C. According to the law of Member State A, the paternity is based on the presumption that the father of the child is the person with whom the mother was in a registered partnership at the time when the child was born and in such case an acknowledgement of the child by its father is not necessary. However, **when the mother applied to the authorities of Member State B for the recognition of parenthood, she was confronted with a refusal of recognition because the registered partnership of the couple is not recognised in Member State B** and, as a result, the legal presumption that the father of the child is the registered partner of the mother is not accepted as a basis for the establishment of parenthood.

The final example that we shall mention here is one involving an **opposite-sex couple who became parents through a surrogacy arrangement carried out in a Member State**. The intended **parents** are both **nationals of Member State A living in Member State B**. The couple had recourse to a **surrogacy arrangement in Member State B** where surrogacy is legal provided certain conditions and safeguards are met and where **the intended parents are considered as the legal parents of the child**: accordingly, the woman is considered as the legal mother of the child and her husband as the legal father. However, **under the law of Member State A surrogacy is not permitted and the surrogate** (that is, the woman who carried the child and gave birth to it) **is regarded as the mother of the child by operation of law**. The problem is that upon the birth of the child, the couple would like to return with their child to their Member State of nationality – Member State A – and apply for a birth certificate and for the citizenship of that Member State for the child. They are, however, worried about what steps they will have to undergo to be considered as the legal parents of the child in that Member State, including a possible need to have to adopt their child, and how long their child will be without nationality documents; most importantly, **they are concerned that the administrative and judicial authorities of their Member State of nationality will refuse to recognise and register the parenthood of their child**.

2.4. The root of the problem: the causes of the problem of non-recognition of parenthood

In the previous part of the chapter, concrete examples of non-recognition encountered by families in a cross-border context within the EU were presented. Nonetheless, those examples focused on the

problem (that is, the non-recognition) and – in some cases – its consequences, but they did not expose the root of the problem. **The aim of this part of the chapter therefore is to explain why parenthood established in one Member State may – currently – not be recognised in the territory of a(nother) Member State**.[55]

The starting point of our explanation should be that **family law remains an area that falls within Member State competence, with the exception of aspects of family law with cross-border implications.** Therefore, it is up to each Member State to determine what, for the purposes of national law, constitutes a family, who can marry whom, and who can become a parent and how.[56] Most importantly for our purposes, in situations which do not have a cross-border element, **each Member State can determine how parenthood can be legally established in its territory and what are its legal effects.** In other words, in such situations, it is a matter of national family law to determine who can become a parent, how (s)he can become a parent, and what are the rights and obligations of parents towards their children and vice-versa. It is, thus, no exaggeration to say that **there are 27 different sets of substantive family law rules** on the establishment of parenthood in the EU.[57] Hence, same-sex couples can, for instance, establish their joint legal parenthood in Spain, but they cannot do so in Cyprus, Greece, or any of the other EU Member States that do not allow two persons of the same sex to be the joint legal parents of a child; hence, one of them (and, in some cases, even both) will remain a stranger – in law – to their child.[58]

It should be emphasised, nonetheless, that **Member States have full control over issues of parenthood *merely in a purely domestic context*,** that is, when two nationals of the same Member State who have never exercised their free movement rights and where the situation does not present any other cross-border element, become parents in that Member State and seek to have their parenthood legally established in that State. Such purely domestic situations escape the ambit of EU law and will, therefore, not be further discussed in this study.[59]

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55 See, also, the explanation in ICF S.A. Final Report (n 14), pp. 14-21.

56 See, for instance, Case C-490/20M, *V.M.A.* (n 16), para. 52.

57 For a comparative overview – albeit from 2014 – of the internal laws and procedures of States around the world for establishing legal parenthood as well as for the legal effects of parenthood see 'A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements', HCCH, March 2014, Prel. Doc. No. 3C, chapter A (the study is available here: https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf).

58 Information regarding which Member States currently allow same-sex couples to be the joint legal parents of a child can be found in ILGA-Europe's Rainbow Map and Index. The Rainbow Map and Index are published on an annual basis, with the latest issues being published in 2022; the documents can be found here: https://www.ilga-europe.org/report/rainbow-europe-2022/. According to the latest issues of the above documents, the following Member States do not allow two persons of the same sex to be recognised as the joint legal parents of a child under any circumstances: Bulgaria, Croatia, Cyprus, Czechia, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania and Slovakia.

59 For a detailed analysis of the notion of purely domestic situations (also known as 'purely internal situations') see A. Tryfonidou, *Reverse Discrimination in EC law* (Kluwer, 2009); V. Verbist, *Reverse Discrimination in the European Union* (Intersentia, 2018).

What interests us for the purposes of this study, nonetheless, are **situations that involve the establishment**[60] **and/or recognition**[61] **of parenthood, *which have a cross-border element* in that they present points of contact with more than one Member State**. Such cross-border elements can obviously be established where there is an exercise of the **free movement rights** that are stemming from EU law, for instance a family – comprised of at least one EU citizen[62] – which leaves one Member State in order to settle into the territory of another or in order to travel to another Member State; or, simply, whenever there is a factual configuration that involves a connection with two or more Member States, for instance a child who has the nationality of a Member State different to the one (s)he resides or a child who has two parents with nationalities that are different from those of the Member State of residence of the family.

In such cross-border situations, the difficulty that arises is that **the substantive family law rules of two or more Member States can potentially apply, and on some occasions the result prescribed by the laws of one Member State may be different to the one prescribed by the laws of another**. For instance, as we have seen in the examples noted earlier, in many situations involving rainbow families, the parent-child relationship between the child and both parents was established according to the laws of the Member State of habitual residence of the family (which allowed two persons of the same sex to be legally recognised as the joint legal parents of a child), however, it could not be established – and thus was also not recognised – under the laws of the Member State of nationality of the child and/or of the parent(s).

The problem of non-recognition, however, does not arise merely from the fact that Member States have different *substantive* family law rules regarding the establishment and recognition of parenthood. The existence of different substantive family law rules **becomes a problem when it is combined** with the fact that **Member State private international law rules in the area of family law also differ, due to the fact that private international law is an area that has traditionally been governed by national law.** Currently, Member States have different private international law rules regarding the establishment and recognition of parenthood.[63]

The **private international law rules of a Member State determine** which substantive law is applicable in a situation where two or more national substantive law rules can apply (the **question of applicable law**)**,** which State's courts are competent to deal with a specific matter when a situation has points of contact with more than one State (**the question of jurisdiction**), and whether a judgment or authentic instrument issued in another State should be recognised and enforced in that Member State

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[60] As established in the Commission's Impact Assessment report (n 11), p. 2, 'various public authorities are involved in establishing and subsequent registering of parenthood at national level. Once parenthood has been established in one Member State (for example, by operation of law after birth), parenthood is generally recorded in a civil or population register. An administrative document containing the information on parenthood – most frequently a birth certificate – is typically provided as the evidence of parenthood. Birth certificates serve as a proof that the birth of a child has been registered and often include information about and evidence of the child's family ties and other information, such as the place of birth. Birth certificates are often required in a variety of administrative and professional procedures or procedures to establish a child's nationality. Besides birth certificates, other documents may be issued recording the parenthood of a child. The parenthood of a child may also be established by a *court decision*, for instance in cases of domestic adoptions or where parenthood has been disputed. Even where parenthood is established by a court decision, a birth certificate is usually subsequently issued'.

[61] Recognition of parenthood entails the legal recognition of the parent-child relationship as this was already established under the laws of another State.

[62] This is because it is only Union citizens that enjoy the right to free movement within the EU. Accordingly, families which are exclusively comprised of third country nationals do not enjoy free movement rights under EU law.

[63] For a comparative overview – albeit from 2014 – of the private international laws and co-operation rules concerning legal parenthood of States around the world see 'A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements' (n 57).

(**the question of recognition**). They also deal with other procedural issues that emerge in cross-border situations, such as the cross-border service of documents, the taking of evidence, and legal aid.

The fact that different Member States have different private international law rules means that when determining which *one* of the substantive family law rules of different Member States should apply in a situation concerning parenthood, or the courts of which Member State have jurisdiction to deal with parenthood matters, different results are prescribed by different Member States. Thus, for instance, the private international law rules of the Member State of nationality of the parents of a child may provide that it is the nationality of the child or of the parents that should be used as a connecting factor when determining which laws should govern the establishment of parenthood in a cross-border situation, whereas the private international law rules of the Member State of residence of the family may be using habitual residence as the connecting factor in such instances. This means that in such a scenario we are faced with the conundrum of different rules that prescribe different results for the same situation, which has the further consequence that parenthood established in one Member State will most likely not be recognised in another.

What is more, Member States also have **different private international law rules with regard to the *recognition* of parenthood already established abroad, including in other Member States, and thus some Member States will automatically recognise such parenthood, whereas others will not.** The root of the problem of non-recognition has been clearly explained by the Commission in its Impact Assessment report: 'When it comes to the recognition of parenthood established abroad, Member States usually have different internal rules and procedures for recognition of parenthood according to whether the recognition of parenthood is sought on the basis of a judgment or of an authentic instrument (such as a birth certificate). Some Member States recognise parenthood automatically, just subject to certain safeguards (such as public policy refusal ground). Other Member States determine parenthood *de novo* based on their national rules and thus accept the parenthood determined abroad only if it corresponds with the result achieved under their national rules. Some Member States apply an *applicable law test*, others apply a *jurisdiction test* and others apply both tests, and where parenthood established abroad has not been established in line with these tests, the recognition may be refused'.[64]

Currently, **EU law does not provide a wholesome solution to the problem of non-recognition of parenthood.** It is, of course, true that **substantive family law cannot be harmonised at EU level** and, thus, the Member States will continue to have full control regarding the *initial* establishment of parenthood within their territory ***in purely domestic situations* that lack a cross-border element**. However, **Article 81(3) TFEU gives competence to the EU to adopt measures on aspects of family law with cross-border implications.** Moreover, **cross-border situations that involve family law issues come within the scope of EU law and** - as it has been established in CJEU case-law - **in situations that fall within the scope of EU law Member States must comply with their obligations under EU law even when acting in areas that fall within their competence**.[65] Hence, as will be seen in the next chapter, in cross-border situations that fall within the scope of EU law, the **CJEU has provided a partial solution** to the problem of the non-recognition of parenthood, by interpreting primary EU law (namely, the free movement provisions) as requiring Member States to mutually

[64] Impact Assessment report (n 11), pp. 16-17.

[65] Case C-148/02, *Garcia Avello* (n 46), para. 25; Case C-353/06, *Grunkin Paul* (n 46), para. 16; Case C-438/14, *Bogendorff von Wolffersdorff* ECLI:EU:C:2016:401, para. 32 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CN0438&qid=1679048800215); Case C-673/16, *Coman* (n 16), paras 37-38.

recognise parenthood established in another Member State for the purpose of the exercise of rights deriving from EU law.

However, EU law does not yet require Member States to recognise the parenthood of a child established in another State (including, in another Member State) for purposes other than those related to the exercise of EU free movement rights. In other words, Member States still have full control when determining whether parenthood established in another Member State can be recognised for the purposes of national law. In addition, as will be seen in the next chapter, **existing EU Regulations that have unified the private international law rules of the Member States regarding family law matters do not include the establishment and recognition of parenthood in their scope** and, thus, Member States maintain different private international law rules with regard to this matter even in situations that present points of contact with two or more Member States.

It is, therefore, **imperative to provide a unified response at EU level through a coordinated and effective system of common private international law rules for all cross-border situations involving parenthood issues**. This is exactly the main aim of the proposal that will be analysed in this study.

Having examined the problem of non-recognition, **we shall now proceed to present the existing legal framework** (at EU and international level) in order to identify the solutions it currently offers (and may potentially offer) to the problem of lack of cross-border recognition of parenthood in the EU.

3. THE EXISTING LEGAL FRAMEWORK AND THE SOLUTIONS IT CURRENTLY OFFERS TO THE PROBLEM OF NON-RECOGNITION OF PARENTHOOD IN THE EU

KEY FINDINGS

- EU law grants to all Member State nationals and (certain of) their family members the **right to move freely** between Member States **and to reside** on the Member State of their choice.
- The **children** of a Union citizen who are under 21 or are dependent on the Union citizen have a **derivative right to join or accompany their parent(s)** in the host Member State or to **return** with them to their Member State of nationality.
- Children who hold the nationality of a Member State and are, thus, Union citizens enjoy **free movement rights** (including family reunification rights). They can 'sponsor' the right of residence of their parents (provided that the latter are dependent on them) and their 'primary carers'.
- **The CJEU has taken a broad approach when interpreting** the categories of family members that can join or accompany the Union citizen who exercises free movement rights and has read the term 'descendants' in a way which expands the notion of the 'family' **beyond the nuclear family model**: it has read this term as **including adopted children** (*SM*) and the **children of same-sex couples** (*V.M.A.* and *K.S.*).
- In ***V.M.A.*** (2021) the CJEU held that Member States are required by Article 21 TFEU to **recognise the parent-child relationship** between a child and the parents (who are a same-sex couple), which was **established in the territory of another Member State** (the Member State of residence of the family) for the purpose of exercising the rights that the child derives from EU law.
- **Regulation 2016/1191 simplifies the administrative formalities** for the presentation of public **documents** in the EU, including documents establishing parenthood. However, **it does not solve the problem of non-recognition of parenthood in the EU** as it does not require the cross-border recognition of the *content* of public documents.
- Private international law has traditionally been an issue of national law. The EU Treaties have, nonetheless, included legal bases through which a rich body of private international law instruments has been adopted at EU level, including in the area of family law. **None of the private international law instruments adopted – to date – by the EU in the family law field includes within its scope matters relating to the establishment and recognition of parenthood**.
- In a number of cases involving **adoption and surrogacy, the ECtHR has held that filiation validly established in any country must be fully recognised in ECHR signatory States** (which include **all EU Member States**), unless the State where recognition is sought can provide a valid **justification for refusing** to do so.
- The **HCCH** is currently exploring the feasibility of adopting a (binding) **convention on legal parentage** and a **separate optional (binding) protocol** on legal parentage established as a result of international **surrogacy** arrangements. If it proceeds with the adoption of these, this can constitute a solution to the problems of non-recognition faced in EU Member States (given that all EU Member States as well as the EU are members of the HCCH) and beyond. However, the process of considering the adoption of these instruments is in its **preparatory phase** and may take some time before binding instruments may be prepared, agreed by members, and – if at all – be widely ratified, including by *all* EU Member States.

3.1. Introduction

The aim of this chapter is to **examine how the existing legal framework provides *partial* solutions to the problem of non-recognition of parenthood in the EU**. The chapter will begin with an analysis of the solutions currently offered by EU free movement law, both through the interpretation of the free movement provisions and relevant secondary legislation law (section 3.2.), as well as through the promulgation of secondary legislation that aims to simplify the administrative formalities for the presentation of public documents in the EU (section 3.3.). The chapter will then proceed to explain how EU private international law has developed and the main instruments that have been introduced in this field and which concern family law matters. The analysis will show that these instruments do not provide a solution to the problem of non-recognition of parenthood within the EU (section 3.4.). The second half of the chapter will consider how non-EU legal instruments provide – or may provide in the future – solutions that are also applicable to EU Member States: section 3.5. will be devoted to the ECHR and its interpretation in ECtHR case-law concerning State refusals to recognise parenthood validly established abroad, whilst section 3.6. will focus on the current work of the HCCH, which may potentially lead to the adoption of two binding instruments aimed at securing the cross-border recognition of parenthood at an international level.

3.2. EU free movement law: the free movement provisions and secondary legislation

3.2.1. Free Movement within the EU and family reunification rights: The relevant legal framework

Since the beginning of its existence, the European legal order granted to Member State nationals the **right to move freely between Member States and to reside in the Member State of their choice**. Being initially granted only to persons who moved for an economic purpose, this right was extended in 1993 to *all* Member State nationals (who now became Union citizens), subject to limitations and conditions.[66]

Being aware that Member State nationals would choose not to move to another Member State if this led to their separation from their loved ones, the **EU legislature**, already from the 1960s, **made provision in secondary legislation for automatic family reunification rights** for migrant Member State nationals.[67] For Union citizens who have moved to a Member State other than that of their nationality, such rights are **currently provided by Directive 2004/38**, which **requires the host Member State to automatically admit within its territory certain categories of family members of the Union citizen**.[68]

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[66] For a detailed analysis of the free movement of persons provisions, including of the status of Union citizenship see C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press, 2022), chapters 6-9 and 11-12; P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 2020), chapters 22-24; R. Schütze, *European Union Law* (Oxford University Press, 2021), chapter 15.

[67] Regulation 1612/68 of the Council on freedom of movement for workers within the Community [1968] OJ L 257/2. The full text of the Regulation is available here: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A31968R1612.

[68] Directive 2004/38 of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77. The full text of the Directive is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0038.

These categories consist of the spouse and (subject to conditions) the registered partner of the Union citizen, as well as their children and parents.[69] More specifically, as regards the two latter categories, which are those that interest us for the purposes of this study, the Directive provides in its Article 2(2) that they consist of, respectively:

> '(c) the **direct descendants** who are under the age of 21 or are dependants and those of the spouse or [registered] partner […]
>
> (d) the **dependent direct relatives** in the ascending line and those of the spouse or [registered] partner […].'

Throughout the Directive it is made clear that the family members listed in Article 2(2) of the instrument can accompany or join the Union citizen in the host Member State and shall have a right of residence on the territory of that State for as long as the Union citizen from whom they derive this right maintains such a right and – in certain cases – for even longer.[70] Accordingly, in order to ensure that Union citizens are not impeded from exercising their free movement rights, they should be allowed to be joined or accompanied by certain of their family members in the host Member State. As established in a long line of CJEU case-law, **the refusal of the host Member State to admit the family members of a Union citizen in its territory, and to grant them a right of residence, constitutes a restriction on the exercise of free movement and, thus, amounts to a breach of EU law, unless justified.**[71] Although, according to recital 5 of the Directive, Union citizens enjoy family reunification rights with their family members who fall within the Article 2(2) categories *irrespective of the nationality of those family members*, in practice it is family members who do not hold the nationality of a Member State - third country nationals - that need to claim a right of residence through a Union citizen: family members who are Union citizens enjoy, in their own right, the right to free movement and residence on the territory of another Member State and, thus, do not need to claim a derivative right through another Union citizen.

As noted earlier, **Directive 2004/38 applies only in situations involving Union citizens who have exercised free movement rights and claim rights in the host Member State, *which must be a Member State other than that of their nationality***.[72] This does not mean, however, that those Union citizens who have exercised free movement rights and, after having done so, return to their Member State of nationality, no longer enjoy the protection of EU law. Indeed, such **'returnees'** are not covered by the Directive, though **through the Court's case-law it has been established that the Treaty free movement provisions directly bestow on them the right to move back to their Member State of nationality together with their family members**,[73] provided that the residence in the host Member State has been 'genuine'.[74] The Court has held that although such situations do not fall within the scope of Directive 2004/38, the latter applies 'by analogy', in order to define the conditions under which

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69 Article 2(2) of Directive 2004/38 (n 68).

70 Articles 12 and 13 of Directive 2004/38 (n 68).

71 For a detailed analysis of this case-law see C. Berneri, *Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens* (Hart, 2017).

72 Article 3(1) of Directive 2004/38 (n 68).

73 Case C-370/90, *Singh* ECLI:EU:C:1992:296 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61990CJ0370&qid=1679049132531); Case C-291/05, *Eind* ECLI:EU:C:2007:771 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0291&qid=1679049179483).

74 Case C-456/12, *O and B* ECLI:EU:C:2014:135, para. 54 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CC0456&qid=1679049217950). Residence in the host Member State is considered 'genuine' if its duration is longer than three months.

family reunification rights may be granted to 'returnees'.[75] From this it follows that the categories of family members that can move to, and reside on, the territory of the Union citizen's Member State of nationality are those laid down in Article 2(2) of Directive 2004/38.

In its judgment in the *Zhu and Chen* case in 2004, the Court held that **minor Union citizens (including babies) are the holders of free movement rights stemming from the Treaty and secondary EU law**.[76] This means that **minor Union citizens can, themselves, sponsor the right of residence of their family members in the Member State where they reside, as they enjoy family reunification rights under EU law**. For obvious reasons, the only category of family members that would be able to derive a right of residence from a Union citizen who is a minor would be – under **Article 2(2)(d) of the Directive** – the '**direct relatives in the ascending line**' (that is, the parents) of the child. The above provision, however, **can in practice only benefit the elderly parents of *adult Union citizens***, as it requires that the parent is 'dependent' on the child: as has been seen in the Court's case-law, in cases involving minor children such dependency by the parent on the child cannot be established, given that it is the latter that is considered to be dependent on its parent(s), rather than the other way round.[77]

Recognising, however, that the effective exercise of their EU rights requires minor Union citizens to be able **to sponsor a right of residence for their parent(s) in situations where the latter are not dependent on them**, **the Court has expanded the category of family members that can enjoy a derivative right of residence through a (minor) Union citizen, to include the primary carer of the child**. Hence, the Court has held that Member States (including the Member State of nationality of a Union citizen) are obliged to grant a right of residence to the parents of a minor Union citizen in situations where the denial of such a right would impede the exercise of the child's free movement and residence rights[78] or would deprive the child of the genuine enjoyment of the substance of the rights enjoyed by virtue of the status of Union citizen.[79]

One final point that should be made here is that the rights that family members of Union citizens enjoy under EU law are not limited to the derivative right to free movement and residence that has been described above, as secondary law also makes provision for a host of **other rights that the family members also enjoy under EU law**. For instance, Article 10 of Regulation 492/2011[80] provides that the children of a 'worker' – within the meaning of Article 45 TFEU – shall be admitted to the host Member State's 'general **educational, apprenticeship and vocational training** courses under the same conditions as the nationals of that State, if such children are resident in its territory'; and according to Article 24(1) of Directive 2004/38,[81] the **right to equal treatment** with the nationals of the host Member State with regard to matters that fall within the scope of EU law 'shall be extended to family

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75 Case C-673/16, *Coman* (n 16) para. 25; Case C-456/12, *O and B* (n 74) para. 50; Case C-133/15, *Chavez-Vilchez* ECLI:EU:C:2017:354, paras. 54-55 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0133&qid=1679049368116); Case C-165/16, *Lounes* ECLI:EU:C:2017:862, para. 61 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0165&qid=1680263385823).

76 Case C-200/02, *Zhu and Chen* ECLI:EU:C:2004:639 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0200&qid=1680263486962).

77 *Zhu and Chen* (n 76), paras. 42-44.

78 See, for instance, Case C-200/02, *Zhu and Chen* (n 76).

79 See, for instance, Case C-34/09, *Ruiz Zambrano* ECLI:EU:C:2011:124 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0034&qid=1679049456014).

80 Regulation 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union [2011] OJ L 141/1. The full text of the Regulation is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011R0492.

81 (n 68).

members who are not nationals of a Member State and who have the right of residence or permanent residence'.

3.2.2. Cross-border recognition of parenthood: the case-law

Having presented the current legal framework that enables families (comprised of at least one Union citizen) to move between Member States and to enjoy certain rights in the Member State of destination, we should now proceed with an **analysis of CJEU case-law involving the non-recognition, by a Member State, of parenthood established under the laws of another State**.

It should first be pointed out that it is not often that the Court has heard cases involving a refusal by a Member State to recognise parenthood established elsewhere. When it did, however, and when it received cases raising (implicitly or explicitly) the issue of the **cross-border recognition of parenthood, the Court took an admittedly broad approach, reading the term 'descendants' in a way which expands the notion of the 'family' beyond the nuclear family model**.[82] In particular, the Court in its case-law has required the cross-border recognition of parenthood in situations involving **re-constituted families**,[83] families consisting of **children and their adoptive parents**,[84] and – in the two more recent cases involving this matter – **rainbow families**.[85]

In the ***SM*** **case, the Court provided for the first time clear guidance on the interpretation of the term 'descendant'** for the purposes of Directive 2004/38.[86] It stated:

> '52. In that regard, it should be noted that the concept of a "direct descendant" commonly refers to the **existence of a direct parent-child relationship connecting the person concerned with another person**. Where there is no parent-child relationship between the citizen of the Union and the child concerned, that child cannot be described as a 'direct descendant' of that citizen for the purposes of Directive 2004/38.
>
> […]
>
> 54. Therefore it must be considered that the concept of a "parent-child relationship" as referred to in paragraph 52 above **must be construed broadly, so that it covers any parent-child relationship, whether biological or legal**. It follows that the concept of a "direct descendant" of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38 must be understood as including both the biological and the adopted child of such a citizen, since it is established that adoption creates a legal parent-child relationship between the child and the citizen of the Union concerned.'

In ***SM*****, the relationship established – in a third country – between the child and her two legal guardians who were Union citizens who had exercised free movement rights, was held not to amount to a 'parent-child relationship'** and thus the child could not qualify as 'descendant' for the purposes of Article 2(2)(d) of Directive 2004/38. Accordingly, the Member State of destination of the legal guardians was not required by EU law to automatically admit the child in its territory and to grant her a right of residence under Directive 2004/38.[87]

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[82] A. Tryfonidou (n 13).

[83] Case C-413/99, *Baumbast* (n 16).

[84] Case C-129/18, *SM* (n 16).

[85] Case C-490/20, *V.M.A.* and Case C-2/21, *K.S.* (n 16).

[86] (n 68).

[87] Though, it was held that the child did fall under the definition of one of the 'other family members […] who in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right

A more positive result on the facts was however reached in the two more recent cases involving the refusal by a Member State to recognise parenthood established in another Member State. It should nonetheless be emphasised that in these cases, **a parent-child relationship had, indeed, been established in a Member State and the second Member State was, therefore, refusing to recognise parenthood already legally established under the legal system of another Member State. These two cases are *V.M.A.*[88] and *K.S*,[89]** the facts of which were presented in the previous chapter of the study: in this chapter, we shall only focus on an analysis of the judgment in *V.M.A.*, given that the Court in *K.S.* confined itself to delivering an Order that simply repeated word for word its ruling in *V.M.A.*

It should be recalled that ***V.M.A.*** concerned the **refusal of the Bulgarian authorities to issue a birth certificate in respect of S.D.K.A. – who was the daughter of V.M.A (a Bulgarian woman) and K.D.K. (a British woman) – on the ground that the birth certificate issued by Spain (the Member State of residence of the family) for the child, noted two persons of the same sex as the parents of the child.** V.M.A. brought an action against this refusal before the Administrative Court of Sofia, which in turn made a reference for a preliminary ruling to the CJEU asking, essentially, whether the contested refusal amounted to a breach of EU law.

The CJEU considered that the child – through V.M.A. – had Bulgarian nationality and, thus, enjoyed the right to free movement within the EU and could rely on it against her Member State of nationality, given that she was born and had been resident on the territory of the host Member State (Spain).[90] It noted that since **S.D.K.A. is a Bulgarian national, Article 4(3) of Directive 2004/38**[91] **requires the Bulgarian authorities to issue an identity card or a passport to her, regardless of whether they draw up a new birth certificate for her**.[92]

The CJEU then stressed that '[s]uch a document, whether alone or accompanied by others, where appropriate by a document issued by the host Member State of the child concerned, **must enable a child in S.D.K.A.'s situation to exercise the right to move and reside freely within the territory of the Member States, guaranteed in Article 21(1) TFEU, with each of the child's two mothers,** whose status as parent of that child has been established by their host Member State during a stay in accordance with Directive 2004/38'.[93] In addition the Court noted that 'in order to enable S.D.K.A. to exercise her right to move and reside freely within the territory of the Member States with each of her two parents, V.M.A. and K.D.K. must have a document which mentions them as being persons entitled to travel with that child. In the present case, the authorities of the host Member State are best placed to draw up such a document, which may consist in a birth certificate. *The other Member States are obliged to recognise that document*'.[94]

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of residence', referred to in Article 3(2)(a) of Directive 2004/38 and thus the host Member State should – merely – facilitate her entry and residence on its territory.

88 (n 16).

89 (n 16).

90 Case C-490/20, *V.M.A.* (n 16), para. 42.

91 Article 4(3) of Directive 2004/38 provides: 'Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality'.

92 Case C-490/20, *V.M.A.* (n 16), para. 45.

93 *V.M.A.* (n 16), para. 46. Article 21(1) TFEU provides: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

94 Case C-490/20, *V.M.A* (n 16) para. 50. Emphasis added.

In its judgment, the CJEU also **considered the possibility that S.D.K.A. does not have Bulgarian nationality**, in which case it pointed out that 'irrespective of their nationality and whether or not they themselves are Union citizens, K.D.K. and S.D.K.A. must be regarded by all Member States as being, respectively, the spouse and the direct descendant within the meaning of Article 2(2)(a) and (c) of Directive 2004/38, and, therefore, as being V.M.A.'s family members'.[95] Hence, **'[a] child, being a minor, whose status as a Union citizen is not established and whose birth certificate, issued by the competent authorities of a Member State, designates as her parents two persons of the same sex, one of whom is a Union citizen, must be considered, by all Member States, a direct descendant of that Union citizen within the meaning of Directive 2004/38 for the purposes of the exercise of the rights conferred in Article 21(1) TFEU and the secondary legislation relating thereto**'.[96]

Having established the obligations stemming from EU law concerning the cross-border legal recognition of the parent-child relationship in situations such as those on the facts of the case, **the Court then proceeded to examine the thorny issues of competence and justification**.

As regards the former, in paragraph 52 of the judgment the CJEU noted:

> '**as EU law currently stands, a person's status**, which is relevant to the rules on marriage and parentage, is a matter that **falls within the competence of the Member States** and EU law does not detract from that competence. **The Member States are thus free to decide whether or not to allow marriage and parenthood for persons of the same sex under their national law**. Nevertheless, **in exercising that competence**, **each Member State must comply with EU law**, in particular the provisions of the FEU Treaty on the freedom conferred on all Union citizens to move and reside within the territory of the Member States by recognising, for that purpose, the civil status of persons that has been established in another Member State in accordance with the law of that other Member State.'

The Court, then, proceeded to consider whether the respect of national identity – laid down in Article 4(2) TEU – can serve as justification for the contested Bulgarian refusal, noting that it does not,[97] as the obligation for a Member State to issue an identity card or a passport to a child who is a national of that Member State in circumstances like those on the facts of the case, '**does not require the Member State of which the child concerned is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship** between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents'.[98] The Court, also, added that '**a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter**',[99] noting that '[i]n the situation with which the main proceedings are concerned, the right to respect for private and family life guaranteed in Article 7 of the Charter and the rights of the child guaranteed in Article 24 of the Charter, in particular the right to have the child's best interests taken into account as a primary

[95] *V.M.A.* (n 16), para. 67.
[96] Case C-490/20, *V.M.A* (n 16), para. 68.
[97] *V.M.A.* (n 16), para. 56.
[98] Case C-490/20, *V.M.A* (n 16), para. 57.
[99] *V.M.A.* (n 16), para. 58.

consideration in all actions relating to children, and the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, are fundamental'.[100]

The *V.M.A.* case, thus, established that **EU law requires Member States to mutually recognise a birth certificate issued by another Member State for the purpose of issuing an identity document for a child, which will be used by the child for the purpose of exercising EU free movement rights *with both parents***. In addition, as noted elsewhere, the ruling has clarified that **the terms used to define the family members with whom the Union citizen enjoys family reunification rights under EU free movement law** (and which – as seen earlier in this chapter – are found in Article 2(2) of Directive 2004/38), **must be interpreted as inclusive of rainbow families**.[101] Moreover, the ruling[102] established that the non-recognition of the parent-child relationship in situations involving the exercise of EU free movement rights can amount to a breach of fundamental human rights laid down in the Charter and in the CRC, to which all EU Member States are signatories.

Despite the fact that the ruling in *V.M.A.* constitutes a very significant positive step towards the cross-border recognition of parenthood in the EU, there are **two important gaps in protection that remain following its delivery** (and the delivery of the Order in *K.S.*).

The first gap is that **the obligation of mutual recognition of parenthood imposed by this ruling appears to only apply where parenthood has been established *in an EU Member State***. The ruling does not clarify whether such an obligation exists, also, when parenthood has been established in a third country.

The second gap concerns **the extent of the obligation of (mutual) recognition** imposed on Member States by the ruling. In its judgment, the **CJEU** had been at pains to underline that **the obligation of recognition is not a general obligation requiring Member States to recognise the familial links (established in another EU Member State) among the members of rainbow families *for all legal purposes*, including for the purposes of national law** (e.g. for inheritance purposes, for taxation purposes, for maintenance purposes, for custody or the right of parents to act as legal representatives of the child such as in issues relating to schooling or health matters, for the receipt of social and other benefits which do not fall within the scope of EU law, and so on). Throughout its ruling, the Court emphasised that the obligation of recognition applies in order to permit the child 'to exercise without impediment, with each of her two parents, her right to move and reside freely within the territory of the Member States',[103] and does not require 'the Member State of which the child concerned is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents'.[104]

Accordingly, as a result of the ruling in *V.M.A.*, **EU law requires Member States to recognise the parenthood of a child a) as established in another Member State and b) for the purposes of the rights that the child derives from EU law**, which include the right to free movement and residence

[100] Case C-490/20, *V.M.A* (n 16), para. 59.

[101] A. Tryfonidou, 'The ECJ Recognises the Right of Rainbow Families to Move Freely Between EU Member States: The *VMA* ruling' (2022) 47 European Law Review 543.

[102] See Case C-490/20, *V.M.A.* (n 16), paras 61-65.

[103] *V.M.A.* (n 16), para. 49.

[104] Case C-490/20, *V.M.A* (n 16), para. 57.

as well as other rights stemming from that right (for instance, the right to equal treatment as regards the receipt of social assistance benefits).

Nonetheless, **the case does not require the Member State where recognition is sought to mutually recognise the contents of a birth certificate a) issued by a third country and b) for the purposes of national law with regard to matters that do not relate to the exercise of free movement rights** (e.g. for inheritance purposes, for taxation purposes, for maintenance purposes, for custody or the right of parents to act as legal representatives of the child such as in issues relating to schooling or health matters, for the receipt of social and other benefits which do not fall within the scope of EU law, and so on).

As will be seen in the next chapter, **if the proposal analysed in this study comes into force in its current form, the first gap in protection will not be filled since the proposed Regulation will only apply to parenthood *established in an EU Member State***. However, the proposed Regulation **shall require recognition of parenthood established in another EU Member State *for all legal purposes*, including for the purposes of national law with regard to matters that do not relate to the exercise of free movement rights, so it will fill the second gap** in protection that persists following the delivery of the *V.M.A.* ruling.

It should be noted that following the CJEU judgment in *V.M.A.*, the referring court – the Administrative Court of Sofia – held that the Sofia municipality was obliged to issue a birth certificate for the child, noting V.M.A. and K.D.K as her two parents.[105] The Sofia municipality filed an appeal against that judgment before the Bulgarian Supreme Administrative Court. The latter then overruled the lower court's decision, upholding the refusal of the Sofia municipality to issue a birth certificate for the child on the ground that the child is not a Bulgarian citizen.[106] The decision of the Bulgarian Supreme Administrative Court is final and not subject to appeal. Accordingly, although the CJEU delivered a clear ruling in the *V.M.A.* case, which held that Member States are required to recognise the parent-child relationship legally established between a child and both her (same-sex) parents in another Member State for the purpose of issuing an identity document for the child which will be used by the child for the purpose of exercising EU free movement rights *with both parents*, **Bulgaria has failed to implement the ruling, in violation of its obligations under EU law.**

Accordingly, one of the Recommendations made by this study (Recommendation 10) is that if Bulgaria continues to fail to comply with the CJEU judgment in *V.M.A.* concerning the cross-border recognition of parenthood for the purpose of the exercise of rights derived from EU law, the Commission should take enforcement action against that Member State under Article 258 TFEU, for failing to comply with its obligations under EU law. The Commission should also examine whether the other 26 Member States comply with the judgment and take enforcement action against any that do not comply.

3.3. EU free movement law – cross-border recognition of documents

Regulation 2016/1191 simplifies the administrative formalities for the presentation of public documents in the EU.[107] This piece of secondary EU legislation is considered to be – essentially – an instrument that aims to facilitate the free movement of Union citizens and, for this reason, the legal

[105] The judgment of the Administrative Court of Sofia is available here: https://tinyurl.com/ytzzsb56.

[106] The judgment of the Bulgarian Supreme Administrative Court is available here: https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=2060937&code=vas.

[107] (n 49).

basis used for its adoption was Article 21(2) TFEU (a legal basis that – as will be seen in chapter 6 of the study – some have argued should be used, also, for the proposal under examination in this study).

Although **Regulation 2016/1191 does not require the cross-border recognition of the *content* of documents** – including documents establishing parenthood – and, thus, **does not provide a solution to the problem of non-recognition of parenthood** demonstrated in the previous chapter, it has nonetheless **simplified and streamlined the administrative formalities that families must comply with when they wish to present a document establishing parenthood to the authorities of another Member State**. Hence, once (and if) the proposal comes into force, Regulation 2016/1191 will continue to play an important role in facilitating the recognition of documents proving parenthood.[108]

The Commission first began considering the difficulties with the cross-border recognition of parenthood in its Green Paper 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records'.[109] In that document, the Commission noted that 'European citizens are still confronted each day with many obstacles to the exercise of' the right to freedom of movement within the Union; '[o]ne reason for these problems is that citizens are required to present public records to the authorities of another Member State in order to provide the proof needed to benefit from a right or to comply with an obligation', and '[v]ery often these documents are not accepted by the authorities of a Member State without bureaucratic formalities that are cumbersome for citizens'.[110] **The Commission, then, pointed out that Union citizens are faced with two types of problems when they exercise their free movement rights: a) uncertainty regarding the *bureaucratic formalities* that concern the *actual documents* themselves when they seek to present them in a Member State other than the one in which they were issued, and b) the refusal of Member States to recognise the *effects* (i.e. the content) of documents issued in other Member States.**

With this Green Paper, **the Commission launched a public consultation on matters relating to freedom of movement of public documents and recognition of the effects of such documents**. This led to lengthy negotiations that culminated in the Commission's presentation of a legislative proposal in 2013,[111] which was approved in accordance with the ordinary legislative procedure by the European Parliament and the Council of the EU: the legal instrument that was adopted was **Regulation 2016/1191**.

As noted in the Green Paper, 'Public documents vary considerably and cover all the official records drawn up by a Member State authority. Examples include administrative documents such as diplomas or patents; notarial acts such as sales deeds for property and marriage contracts; *civil status records such as birth, marriage or death certificates*; plus *judicial documents such as court rulings or documents issued by a court*'.[112] **The aim of the 2016 Regulation has been to promote the free movement of citizens**

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[108] This is acknowledged in the proposal when it is noted, in Article 2(2), that 'This Regulation shall not affect Regulation (EU) 2016/1191, in particular as regards public documents, as defined in that Regulation, on birth, parenthood and adoption.'

[109] COM(2010) 747 final. The full text of the Green Paper is available here: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52010DC0747.

[110] In the Paper the Commission noted that these documents can be 'administrative documents, notarial acts such as property deeds, civil status records such as birth or marriage certificates, miscellaneous contracts or court rulings' and their 'common function' is 'to establish evidence of facts recorded by an authority. In most cases they must be produced to obtain access to a right, to receive a social service or to comply with a tax obligation'.

[111] Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation 1024/2012, COM/2013/0228 final. The full text of the proposal is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013PC0228.

[112] Emphasis added.

by simplifying the requirements for presenting certain public documents in the EU.[113] In particular, as noted in Recital 3 of the 2016 Regulation, '[i]n accordance with the principle of mutual trust and in order to promote the free movement of persons within the Union, this Regulation should set out a system for further simplification of administrative formalities for the circulation of certain public documents and their certified copies where those public documents and the certified copies thereof are issued by a Member State authority for presentation in another Member State'. **The Regulation effectively exempts from all forms of legalisation**[114] **and similar formality the public documents falling within its scope,**[115] **whilst it provides that other formalities, namely, the requirement to provide in each instance certified copies and translations of public documents, should be simplified.**[116] Moreover, in order to overcome language barriers, the 2016 Regulation makes provision for the establishment of multilingual forms in each of the official languages of EU institutions for certain public documents, including for those concerning birth.[117]

As noted in its Recital 6 and Article 2, **the 2016 Regulation covers public documents issued by the authorities of a Member State in accordance with its national law and the primary purpose of which is to establish, inter alia, birth, parenthood and adoption, whilst Recital 14 of the Regulation explains that '[t]he concept of "parenthood" should be interpreted as meaning the legal relationship between a child and the child's parents'.** It should be underlined nonetheless that the Regulation does not have as its effect – nor was it intended – to require Member States to legally recognise *the contents* of public documents falling within its scope and which were issued by another Member State: **'The aim of this Regulation is not to change the substantive law of the Member States relating to birth, […] parenthood, [and] adoption […]. Furthermore, this Regulation should not affect the recognition in one Member State of legal effects relating to the content of a public document issued in another Member State'.**[118] In addition, **Article 2(4) of the Regulation provides that '[t]his Regulation does not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another Member State'.**

Hence, **the 2016 Regulation provides a solution to the first type of problems identified in the Commission's 2010 Green Paper – namely burdensome bureaucratic formalities concerning the actual documents themselves – but does not provide a solution to the second type of problems faced by Union citizens, that is, the non-recognition of the *effects*** (that is, the content) **of documents issued in other Member States**.

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[113] Already in 1997, the CJEU noted that the free movement of workers provisions require Member States to accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question – see Case C-336/94 *Dafeki* ECLI:EU:C:1997:579 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CJ0336&qid=1679049769844).

[114] As explained by the Commission in its Green Paper 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (n 109), '[t]he traditional way of authenticating public documents designed for use abroad is *legalisation*. Legalisation consists of a chain of individual authentication procedures for a document. In the ordinary legalisation procedure, a document must be legalised by the competent authorities of the Member State which issued it and then by the embassy or consulate of the Member State in which it will be used. The legalisation process is often slow and costly because of the number of authorities involved'.

[115] Article 4 of Regulation 2016/1191 (n 49).

[116] Recitals 19 and 20 and Articles 1(1), 5 and 6 of Regulation 2016/1191 (n 49).

[117] Recital 21 and Articles 1(2) and 7 of Regulation 2016/1191 (n 49).

[118] Recital 18 of Regulation 2016/1191 (n 49).

The Commission's proposal under examination in this study seeks to provide a solution to this second type of problem faced by Union citizens, albeit in one very specific context: the non-recognition by a Member State of the effects of public documents concerning birth, parentage and adoption which have been issued by another Member State. As will be seen in the next chapter, the proposal seeks to provide a solution to this problem by adopting – in parallel – both of the ways that have been identified by the Commission's Green Paper as possible solutions for resolving such problems in the context of parenthood, namely, the automatic (mutual) recognition of civil status events concerning parenthood and the unification of the private international law rules concerning the establishment of parenthood in situations that present points of contact with more than one Member State.

3.4. EU private international law

As noted in a 2012 study commissioned by the European Parliament, the term **'private international law'** refers to 'the part of the **law that deals with private law cases with a foreign or cross-border element**'.[119] It includes rules regarding the determination of jurisdiction and applicable law ('choice of law') and the recognition and enforcement of foreign judgments and authentic instruments, as well as the administrative aspects of these, such as the cross-border service of documents, the procedure for recognition of documents, and the taking of evidence in cross-border cases.

Private international law has traditionally been – and for a part still is – an issue of national law. Nonetheless, **the EU Treaties have included legal bases** through which a rich body of private international law instruments has been adopted at EU level. Since 1999, this field of EU law has grown rapidly.[120]

The EEC Treaty – that survives today after successive amendments as the TFEU – **included in its original text a provision, Article 220 EEC,** which gave the power to the Member States 'so far as necessary' to commence negotiations with each other in order to secure for the benefit of their nationals a variety of issues, such as the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals.[121] This provision **formed the legal basis of the 1968 Brussels Convention** on jurisdiction, recognition and the enforcement of judgments in civil and commercial matters, which constitutes the first major private international law instrument adopted by (what is today) the EU,[122] and has been one of the 'most visible, early achievements of European private international law'.[123] As another scholar has noted, this early instrument 'marked the beginning of the European judicial area' and had as its objective 'to guarantee legal certainty for citizens and economic operators and equality of rights in raising their claims and in

[119] 'A European Framework for private international law: current gaps and future perspectives', study requested by the Committee on Legal Affairs of the European Parliament, 2012, PE 462.487, p. 15 (available here: https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET(2012)462487).

[120] J. Meeusen, 'Comparing Interstate and European Conflict of Laws from a Constitutional Perspective: Can the United States Inspire the European Union?' (2019) 67 American Journal of Comparative Law 637, p. 639.

[121] This provision no longer exists in the constituent EU Treaties.

[122] 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters [1972] OJ L 299/32. The full text of the (consolidated version of the) Convention is available here: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:41968A0927(01).

[123] J. Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 European Journal of Migration and Law 287, p. 288.

obtaining satisfaction for their rights, allowing for the exercise of what has come to be known as the "fifth freedom", ie, the free circulation of judgments'.[124]

The first building blocks of what is considered the *modern* EU private international law were, nonetheless, placed in 1993, when the Treaty of Maastricht, in its Title VI, Articles K-K9, brought various 'matters of common interest' within the scope of application of the newly-formed third pillar of the EU ('Justice and Home Affairs'), which were deemed relevant for realising the **free movement of persons**. These included **judicial cooperation in civil matters**. Given that these matters were originally placed within the mostly intergovernmental third pillar of the EU, they mainly fell under the responsibility of the Council of Ministers, which could take joint positions or actions and draw up conventions to be submitted to the Member States for ratification, but could not introduce the classic legislative instruments that were available for first pillar matters (namely, Directives, Regulations, and Decisions). In other words, **at that time, matters of private international law were unified by means of intergovernmental cooperation**. Moreover, the **CJEU** had **no jurisdiction** in matters falling within this pillar. Title VI formed the basis for a number of instruments and provisions that sought to achieve judicial cooperation in civil matters, the most important being the so-called **'Brussels II' convention**, which established rules for determining the jurisdiction and the enforcement of judgments in matrimonial matters.[125]

The coming into force of the **Treaty of Amsterdam** in 1999 'marked a true turning point in the development of European private international law'.[126] It brought with it **significant changes to the pillar-structure of the EU, by transferring, inter alia, judicial cooperation in civil matters to the first pillar (the 'Community pillar')**, which was now in a new dedicated Title concerning 'visas, asylum, immigration and other policies related to free movement of persons'.[127] The communitarisation of this aspect of justice and home affairs was significant in that **judicial cooperation in civil matters could now be deeper and be achieved through the adoption of binding acts and the establishment of control procedures**.[128] In addition, the **CJEU now had jurisdiction** in matters falling within this area. The Treaty of Amsterdam also defined with more precision the notion of the 'area of freedom, security and justice',[129] and introduced **Article 65 EC – a new legal basis** – which enabled the EU to take measures in the area of **judicial cooperation in civil matters having cross-border implications**, 'insofar as necessary for the proper functioning of the internal market', which included the recognition and enforcement of judgments on civil matters and the promotion of compatibility of the national rules on conflicts of laws and jurisdiction. It was clear that **aspects of family law were included in this legal**

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124 S. Bariatti, *Cases and Materials on EU Private International Law* (Hart, 2011) 2.

125 Council Regulation 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L 160/19 (no longer in force) (full text available here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32000R1347). These matters are currently covered by Council Regulation 2019/1111 of 25 June 2019 concerning jurisdiction, the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1. The full text of the Regulation is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019R1111.

126 N. A. Baarsma, *The Europeanisation of International Family Law* (T.M.C. Asser Press, 2011), p. 84.

127 Title IV, Articles 61-69 EC.

128 H. van Loon and A. Schulz, 'The European Community and the Hague Conference on Private International Law' in B. Martenczuk and S. van Thiel (eds), *Justice, Liberty, Security* (VUB Press, 2008), pp. 257-299.

129 Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (the 'Vienna Action Plan') [1999] OJ C 19/01; the full text of the Action Plan is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999Y0123%2801%29. This was later developed in the conclusions of the extraordinary European Council held in Tampere on 15 and 16 October 1999 (these are available here: https://www.europarl.europa.eu/summits/tam_en.htm).

basis.[130] The Conclusions of the European Council at Tampere in October 1999, which were issued just a few months after the Treaty of Amsterdam came into force, pointed out that in the EU area of justice '[j]udgments and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved'.[131] Thus, it comes as no surprise that **with the coming into force of the Treaty of Amsterdam, judicial cooperation in civil matters (including judicial cooperation within the field of family law) became an important element in the construction of an area of freedom, security and justice within the EU**.[132]

The changes made by the Treaty of Lisbon in 2009 led to the creation of a new, dedicated, chapter on judicial cooperation in civil matters – Chapter 3 – which consists of only one provision, Article 81 TFEU. Chapter 3 is within Title V of the Treaty, which is devoted to the 'Area of freedom, security and justice', and which attributes shared competences between the EU and the Member States in this area. Article 81 TFEU, which is the successor of Article 65 EC, is broader than the latter and covers judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases.[133] Most importantly for the purposes of this study, **Article 81(3) TFEU introduced a new legal basis for measures concerning family law with cross-border implications**. According to this provision, such measures must 'be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament'.[134]

As will be seen in the next chapter, **Article 81(3) TFEU has been chosen by the Commission as the legal basis for the proposal that is under examination in this study**. It has, also, been chosen as the legal basis for a number of other private international law instruments in the family law field,[135] such as the **Brussels IIa recast Regulation**,[136] which provides, inter alia, for common conflict rules and rules on the recognition of judgments on children's custody and visiting rights to children.

Other EU instruments in the private international law field relevant to children in cross-border situations are the **Maintenance Regulation**, which provides, inter alia, for common conflict rules and

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[130] J. Meeusen (n 123), p. 292.

[131] (n 129).

[132] N. A. Baarsma (n 126) p. 80.

[133] As the Commission has explained '[m]utual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state. Mutual trust is an important element, not only trust in the adequacy of one's partners rules, but also trust that these rules are correctly applied' – Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final, p. 4 (the full text of the Communication is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52000DC0495). For the importance of the principle of mutual recognition in EU private international law see J. Meeusen (n 123) pp. 298-305.

[134] Article 81(3) TFEU includes a special passerelle clause according to which the Council 'on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision'.

[135] For an analysis of the EU private international law regime in the area of family law see R. Espinosa Calabuig, 'Cross-border Family Issues in the EU: Multiplicity of Instruments, Inconsistencies and Problems of Coordination' in V. Ruiz Abou-Nigm and M. Blanca Noodt Taquela (eds), *Diversity and Integration in Private International Law* (Edinburgh University Press, 2019); M. Župan and V. Puljko, 'Shaping European Private International Family Law' (2010) 7 Slovenian Law Review 23.

[136] Regulation 2019/111 (n 125).

rules on the recognition of judgments on maintenance obligations arising from parentage,[137] and the **Succession Regulation**, which provides, inter alia, for common conflict rules and rules on the recognition of judgments on succession.[138] It should be highlighted, nonetheless, that as noted in the Commission's IIA,[139] **none of the above instruments**[140] **includes matters relating to the establishment and recognition of parenthood within their scope**: '[e]ach of the EU legal instruments in place tackles specific legal effects that are derived from parenthood (e.g. maintenance rights, succession, parental responsibility), yet none actually address the cross-border recognition of parenthood. This gap is caused by the fact that these legislative instruments only address some of the legal effects deriving from marriage, parenthood and other family relationships, while the nature of the relationships is kept outside their scope'.[141]

Hence, **the proposed Regulation under examination in this study aims to fill this gap in the EU private international family law framework**. As illustrated in the Explanatory Memorandum accompanying the proposal, the latter 'would **complement** current Union legislation on family law and succession and **facilitate its application**, as the parenthood of a child is a preliminary question that must be resolved before applying existing Union rules on parental responsibility, maintenance and succession as regards the child'.[142]

3.5. The ECHR

The Council of Europe is the leading human rights organisation in Europe. It was established in May 1949, as a direct response to the massive violations of human rights perpetrated during World War II. **The Council of Europe has been – and is – completely independent of the EU, though its flagship instrument, the ECHR, has always played an important role in inspiring the development of fundamental human rights protection in the EU**, and this is so even now that the EU has its own catalogue of human rights, the Charter.[143] Its large **membership** of 46 Member States spanning across all corners of Europe, **includes all 27 EU Member States**, who are also signatories to the ECHR.[144]

As we shall see in this part of the chapter, **in the past couple of decades the ECtHR has delivered several rulings in situations involving the cross-border recognition of parenthood**. **Since all EU Member States are signatories to the ECHR, this case-law is binding on all Member States** and, thus, the solutions provided by this case-law to the problem of non-recognition of parenthood in a cross-border context are also applicable in situations of non-recognition of parenthood effected by EU Member States. In fact, given that – as we shall see – **the rulings require the cross-border recognition of parenthood established in *any country*** (and not, just, in an (EU) Member State) they impose an

[137] Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1. The full text of the Regulation is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009R0004.

[138] Regulation 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107. The full text of the Regulation is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0650.

[139] (n 22).

[140] All these instruments can be found in C. Honorati and M. C. Baruffi, *EU Private International Law in Family Matters: Legislation and CJEU Case Law* (Intersentia, 2022).

[141] ICF S.A. Final Report (n 14), p. 55.

[142] Explanatory Memorandum attached to the proposal (n 2) p. 4 (emphasis in the original).

[143] (n 37).

[144] For a list of all the Council of Europe Member States see: https://www.coe.int/en/web/about-us/our-member-states.

obligation that has a wider territorial scope than that of the Commission proposal under examination in this study.

The **difficulties with the enforcement of judicial decisions of the European supranational courts** as identified by the Commission in its Impact Assessment report, should nonetheless be highlighted here:

> '**As these binding obligations do not need to be implemented in national statutory law and often are not, the application of the CJEU and ECtHR case law in individual cases is often left to national courts**, which results in practical difficulties as the case law requires a certain outcome without specifying how recognition should be achieved. As a result, while national authorities, in particular courts must follow the obligations laid down in the case law, they struggle to come to a decision that balances the best interests of the child and the policy goals of their Member State. The reasoning applied by national courts to strike such balance in their decisions is therefore highly unpredictable, which negatively affects legal certainly for cross-border families and often requires that families have to appeal before national courts against an initial refusal of parenthood recognition'.[145]

Accordingly, **although the rulings** that we shall consider below **offer a solution to some of the problems that the proposal seeks to resolve, the difficulties with enforcement of judicial pronouncements demonstrate the need for a legislative solution to this problem**.

The cases that concerned the cross-border recognition of parenthood and which have reached the ECtHR have all raised issues under Article 8 ECHR, which provides the right to respect for **private and family life**.[146] As will be seen, the case-law can be divided into three categories: cases involving the cross-border recognition of the parenthood of adopted children; cases that concern the cross-border recognition of the parenthood of surrogate-born children; and a case that involves the issue of the cross-border recognition of parenthood in a rainbow family. The first two categories include mostly decided cases, whereas the third category includes one pending case. We should turn, now, to an analysis of this case-law.

3.5.1. The cross-border recognition of the parenthood of adopted children

The **first case** to ever reach the ECtHR involving the cross-border recognition of parenthood was ***Wagner***.[147] The case concerned the **refusal of the Luxembourg authorities to recognise and enforce a full adoption decision made by a Peruvian court**, on the ground that the **adoption of the child (J.M.W.L.) was made by an unmarried woman (Ms Wagner) and the Luxembourg Civil Code did not make provision for full adoption by a single woman**. The applicants (Ms Wagner and J.M.W.L.) complained of a breach of their right to respect for their family life and of discriminatory treatment contrary to the ECHR.

After exhausting all domestic avenues for challenging the refusal of the Luxembourg authorities to recognise the parent-child relationship between them, the applicants lodged a case before the ECtHR, claiming, inter alia, that the Luxembourg authorities' refusal to grant enforcement of the judgment of

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[145] Impact Assessment report (n 11), pp. 6-7.

[146] For an analysis of Article 8 ECHR as interpreted by the ECtHR see P. Hirvelä and S. Heikkilä, *Right to Respect for Private and Family Life, Home and Correspondence: A Practical Guide to the Article 8 Case-Law of the European Court of Human Rights* (Intersentia, 2021). For an analysis of the interpretation of the same right under EU law see M. González Pascual and A. Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge, 2018).

[147] *Wagner and J.M.L.W. v. Luxembourg*, App. No. 76240/01 (ECtHR, 2007) (https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-81328%22]%7D).

the Peruvian court pronouncing the full adoption of the child – and the resultant non-recognition of the parent-child relationship between the applicants – infringed their right to respect for family life, laid down in Article 8 ECHR. Having concluded that the applicants enjoyed family life together,[148] **the ECtHR** then **proceeded to point out that the contested refusal of recognition amounted to an interference with the right to respect for family life of the applicants**: 'Although the Luxembourg court's refusal to grant enforcement of the Peruvian judgment is the result of the absence in the Luxembourg legislation of provisions allowing an unmarried person to obtain full adoption of a child, the Court considers that that refusal represented in this case an "interference" with the right to respect for the applicants' family life'.[149] **Hence, such an interference constituted a breach of Article 8 ECHR, unless it was justified in accordance with Article 8(2) ECHR**.[150] When examining whether the contested refusal was justified, the Court pointed out that the interference was in accordance with the law (as it was based on the Luxembourg Civil Code),[151] and that it was meant to protect the 'health and morals' and the 'rights and freedoms' of the child.[152]

In considering the **proportionality** of the measure, the ECtHR concluded that **the measure was not justified** in accordance with Article 8(2) ECHR, pointing out the following:

> '132. The Court considers that **the decision refusing enforcement fails to take account of the social reality of the situation**. Accordingly, since the Luxembourg courts did not formally acknowledge the legal existence of the family ties created by the Peruvian full adoption, those ties do not produce their effects in full in Luxembourg. The **applicants encounter obstacles in their daily life and the child is not afforded legal protection making it possible for her to be fully integrated into the adoptive family**.
>
> 133. **Bearing in mind that the best interests of the child are paramount in such a case** […], the Court considers that **the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention**. However, the national authorities refused to recognise that situation, making the Luxembourg conflict rules take precedence over the social reality and the situation of the persons concerned in order to apply the limits which Luxembourg law places on full adoption.
>
> […]
>
> 135. The Court concludes that in this case **the Luxembourg courts could not reasonably refuse to recognise the family ties that pre-existed *de facto* between the applicants and thus dispense with an actual examination of the situation**. Reiterating, moreover, that the Convention is a "living instrument and must be interpreted in the light of present-day conditions", the Court considers that the reasons put forward by the national authorities – namely, the strict application, in accordance with the Luxembourg rules on the conflict of laws, of Article 367 of the Civil Code, which permits adoption only by married couples – are not "sufficient" for the purposes of paragraph 2 of Article 8.'

The ECtHR, subsequently, concluded that **there was, also, a violation of Article 8 *read in conjunction with* Article 14 ECHR, in that on the facts of the case there was an unjustified difference in**

[148] *Wagner* (n 147), para. 117.
[149] *Wagner* (n 147), para. 123.
[150] *Wagner* (n 147), para. 124.
[151] *Wagner* (n 147), para. 125.
[152] *Wagner* (n 147), para. 126.

treatment between children according to whether or not the foreign full adoption judgment was recognised in Luxembourg. The ECtHR's reasoning is important and, thus, should be quoted here in full:

> '155. In spite of the fact that the applicant followed all the steps required by the Peruvian procedure in good faith and that, in addition, the social worker recommended the adoption in Luxembourg […], the full adoption judgment delivered in Peru was not recognised by the Luxembourg authorities. The consequence of this refusal to order enforcement is that **the second applicant suffers on a daily basis a difference in treatment by comparison with a child whose full adoption is recognised in Luxembourg**. It is an inescapable finding in this case that **the child's ties with her family of origin have been severed but that no full and entire substitute tie exists with her adoptive mother**. The second applicant is therefore **in a legal vacuum** which has not been remedied by the fact that simple adoption has been granted in the meantime […].
>
> 156. It follows in particular that, **not having acquired Luxembourg nationality, the second applicant does not have the advantage of, for example, Community preference**; if she wished to serve an occupational apprenticeship she would not obtain a work permit unless it were shown that an equivalent candidate could not be found on the European employment market. Next, and above all, **for more than ten years the minor child has had to be regularly given leave to remain in Luxembourg and has had to obtain a visa in order to visit certain countries**, in particular Switzerland. As for the **first applicant, she indirectly suffers, on a daily basis, the obstacles experienced by her child**, since she must, *inter alia*, carry out all the administrative procedures resulting from the fact that the former has not obtained Luxembourg nationality.
>
> 157. **The Court does not find any ground in the present case to justify such discrimination** […].
>
> 158. In any event, the Court considers that **the second applicant cannot be blamed for circumstances for which she is not responsible** […]. It must be noted that, because of her status as a child adopted by a Luxembourg unmarried mother who has not obtained recognition in Luxembourg of the family ties created by the foreign judgment, she is penalised in her daily existence […].'

Accordingly, **Article 8 ECHR, whether alone or read together with Article 14 ECHR, requires ECHR signatory States – which include all EU Member States – to recognise an adoption order of a court of a foreign country that validly establishes filiation between a child and her adoptive parent(s), unless a refusal of such recognition can be justified**.

A few years after the ruling in *Wagner* was delivered, **the obligation** imposed on signatory States regarding the recognition of parenthood established through an adoption order made by a court of another country, **was extended to a situation involving the adoption of an *adult* person**. ***Negrepontis-Giannisis v. Greece***[153] involved the full adoption of the applicant – an adult man – by his uncle, a monk. The adoption was made through a USA court order and was, initially, declared final and legally enforceable in Greece by a Greek court, while the applicant was allowed to add his adoptive father's surname to his original surname. The problems began when members of the adoptive father's

[153] *Negrepontis-Giannisis v. Greece*, App. no. 56759/08 (ECtHR, 2011) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-166505%22]}).

family brought court proceedings challenging the recognition of the adoption, on the ground that monks were prohibited from carrying out legal acts – such as adoption – which related to secular activities, as this was 'incompatible with monastic life and contrary to the principles of Greek public policy'. The case eventually reached the full Court of Cassation of Greece, which held that the adoption could not be recognised as it was contrary to Greek public policy; this meant that – in the end – the Greek authorities had to revoke the recognition of the adoption order made by the USA court. This led the applicant to lodge an application with the ECtHR claiming that this refusal of recognition amounted to a violation of, inter alia, Articles 14 and/or 8 ECHR. The ECtHR – in line with *Wagner* – held that the **refusal to recognise the adoption** of Mr Negrepontis-Giannisis by his uncle in the USA had amounted to an **interference** with the former's right to respect for his private and family life and had **not met any pressing social need, nor had it been proportionate to the aim pursued**. The ECtHR, also, found that there was a difference in the treatment of the applicant, as an adopted child, compared with a biological child, which was **discriminatory** in that it had no objective and reasonable justification. Accordingly, the ECtHR concluded that Greece had been in violation of the rights of Mr Negrepontis-Giannisis under Article 8 ECHR read alone and in conjunction with Article 14 ECHR.

Accordingly, it is clear from the above rulings that **when an adoption order has been validly made in one country, establishing filiation between a minor child *or* an adult child and their adoptive parent(s), ECHR signatory States are required to give full recognition to that order in their territory, unless they can provide a valid justification for refusing to do so**.

3.5.2. The cross-border recognition of the parenthood of surrogate-born children

We should proceed now to a presentation of the **ECtHR case-law, which concerned the much more controversial issue of the cross-border recognition of the filiation between surrogate-born children and their (intended) parents**.[154]

Surrogacy is a method of artificial reproduction where a woman (the surrogate) carries and delivers a baby for another person or couple (the intended parent(s)). There are two types of surrogacy: **traditional surrogacy**, where the surrogate is genetically related to the baby as her egg or eggs get artificially inseminated with the sperm of the intended father or a donor; and **gestational surrogacy**, where the baby is not genetically related to the surrogate, as the embryo created using the eggs and sperm of the intended parents or donors is transferred to the surrogate. In instances of traditional surrogacy, one of the two intended parents – that is, the man in an opposite-sex couple or one of the two men in a same-sex couple – may be genetically related to the baby; it may, also, be that neither of the intended parents is genetically related to the child. In instances of gestational surrogacy, all scenarios are possible, that is, it may be that the baby is genetically related to both of the intended parents or neither of them, or it may be that it is genetically related to only one of the two intended parents.

Surrogacy is a highly controversial method of artificial reproduction. It involves a number of serious social and ethical dilemmas, as it is considered that it creates a number of risks for everyone involved, including potential exploitation of the surrogate but, also, of the intended parents.[155] Some,

[154] For a more detailed analysis of the points made in this section see A. Tryfonidou, 'Surrogacy in the ECHR and the European Institutions' in K. Trimmings, S. Shakargy and C. Achmad (eds), *Research Handbook on Surrogacy and the Law* (Edward Elgar, forthcoming). See, also, A. Margaria, 'Surrogacy before European Courts: The Gender of Legal Fictions' in M-L. Öberg and A. Tryfonidou (eds), *The Family in EU law* (Cambridge University Press, forthcoming).

[155] See, for instance, M. Freeman, 'Is Surrogacy Exploitative?' in S. McLean (ed), *Legal Issues in Human Reproduction* (Dartmouth Publishing, 1989); J. W. Tobin, 'To prohibit or permit: what is the (human) rights response to the practice of international

also, argue that surrogacy involves commodification of the human body (of the surrogate as well as of the baby) and thus have ethical objections towards it.[156] At the same time, for some individuals or couples, it may be the only option for having a child that will be genetically related to one or both of them.[157]

It is, therefore, unsurprising that the regulation of surrogacy varies hugely from country to country, with some countries banning it completely, others permitting and explicitly regulating it, and others neither prohibiting it nor regulating it. **The fact that different countries have different rules regarding surrogacy, with some completely forbidding it, has given rise to 'surrogacy tourism', whereby in order to circumvent domestic surrogacy prohibitions, couples or individuals travel abroad in order to enter into surrogacy arrangements in surrogacy-friendly jurisdictions**.[158]

It is for this reason that **if a country wishes to discourage persons within its jurisdiction from resorting to surrogacy, it does not suffice for it to prohibit surrogacy within its territory: it must, also, accompany this with measures that discourage people from going abroad to enter into a surrogacy arrangement and then return to its territory claiming recognition**. **Such measures will**, most fundamentally, **involve a refusal** – on the grounds of public policy – **to legally recognise the parent-child relationship between the child and the intended parent(s)** once they return to that State. This will, essentially, take the form of a refusal to recognise a court ruling or birth certificate of the State (often the State of birth of the child which often corresponds to the State of habitual residence of the surrogate), which legally established the parenthood of the child by the intended parents.[159]

Due to the fact that surrogacy is a rather recent practice, questions involving this practice have reached the ECtHR only in the last ten years. This **case-law has arisen as a result of the efforts by intended parents to circumvent the surrogacy bans of their State of residence** – which is an ECHR signatory State – **through pursuing international surrogacy arrangements in a surrogacy-friendly jurisdiction where the child is born, before they return to their State of residence where they seek recognition of the filiation between them and the (surrogate-born) child as established in**

commercial surrogacy?' (2014) 63 International and Comparative Law Quarterly 317; P. Brinsden, 'Surrogacy's Past, Present and Future' in E Scott Sills (ed.), *Handbook of Gestational Surrogacy* (Cambridge University Press, 2016).

[156] See, for instance, J. Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (New York University Press, 1997), Chapters 3 and 4.

[157] Surrogacy is mainly resorted to by single men who wish to have a child that will be genetically related to them; by single women who are unable to bear a child and wish to have a child that will be genetically connected to them; by opposite-sex couples where the female partner is unable to carry a child; and by (especially male) same-sex couples.

[158] In a study prepared for the EP in 2013, it was noted that surrogacy was – at the time – expressly prohibited in Bulgaria, France, Germany, Italy, Malta, Portugal, Spain, and Sweden (but only certain aspects of it) – see 'A comparative study on the regime of surrogacy in EU Member States' requested by the European Parliament's Committee on Legal Affairs (May 2013), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf. Croatia – which joined the EU after the above study was completed – also expressly prohibits surrogacy, as do Lithuania and Slovenia. There are also other Member States which do not have legislation which specifically prohibits surrogacy, but where certain limitations imposed by laws which regulate ART effectively amount to a ban on surrogacy or certain types of surrogacy – this is the case in Austria, Estonia, Finland and Hungary (someone could place Sweden in this category, rather than in the category of Member States which expressly prohibit surrogacy). Finally, there are a number of Member States which do not regulate surrogacy, which are Belgium, Czechia, Ireland, Latvia, Luxembourg, the Netherlands, Poland and Slovakia. Surrogacy appears to be currently regulated in only two Member States, namely, Cyprus and Greece. For an analysis of the laws of some of the EU Member States see J. M. Scherpe, C. Fenton-Glynn and T. Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia, 2019). For an analysis of the ethical and legal challenges associated with surrogacy tourism see R. P. Gunputh and K. A. Choong, 'Surrogacy Tourism: The Ethical and Legal Challenges' (2015) 15 International Journal of Tourism Sciences 16.

[159] Permanent Bureau of the Hague Conference on Private International Law, *A Preliminary Report on the Issues from International Surrogacy Arrangements*, Preliminary Document No 10 (March 2012), para 1 (available here: https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf).

the country where the child was born. This presents the State of residence of the (intended) parents – where recognition is sought – with a *fait accompli*, which places it in the difficult position of having either to recognise the child's parenthood and risk encouraging these evasive practices or not recognising the child's parenthood and penalising the child for the adults' failure to comply with the law.

The **first surrogacy case that reached the ECtHR was *Mennesson v. France***.[160] **France is one of the European States that explicitly prohibit surrogacy**. Mr and Mrs Mennesson – French nationals living in France – could not have a child naturally and, thus, they resorted to gestational surrogacy in the USA, using Mr Mennesson's sperm and donor eggs. As a result of the arrangement, twin girls were born in California, where they were recognised legally as the children of their intended parents, Mr and Mrs Mennesson. When the family returned to France, the four of them were allowed to live together, however, the **French authorities denied recognition** of the parent-child relationship between the children and both of the intended parents, as it would be contrary to public policy. The Mennesson family lodged an application with the ECtHR, through which they complained of a breach of their right to respect for private and family life guaranteed by Article 8 ECHR.

In its judgment, the ECtHR took a child-centred approach,[161] and held that **the refusal to recognise the parent-child relationship between the children and their biological (intended) father, amounted to a breach *of the children's* right to respect for their private life, as it affected the essence of their identity, which includes (genetic) parentage**. Although it found that the four applicants (the intended parents and the children) enjoyed family life together and that the contested refusal to recognise the parent-child relationship between the children and their intended parents amounted to an interference with the enjoyment of family life, it nonetheless concluded that the interference was justified and proportionate in that the practical obstacles that the applicants encountered in their daily life due to the contested non-recognition of the parent-child relationship, were not insurmountable. Accordingly, the ECtHR concluded that there was a violation of Article 8 ECHR, but only as a result of an unjustified violation of the children's right to respect for their private life.

Mennesson v. France, therefore, clarified that **the right to respect for private life of the children born through gestational surrogacy requires States to recognise the parent-child relationship between the children and the intended *father who is genetically linked to them***.

More recently, in ***D v. France*, the same court clarified that where the intended parent who is genetically connected to the child is the *mother* rather than the father, the *Mennesson v. France* principle still applies** and, thus, Article 8 ECHR requires signatory States to recognise the relationship between surrogate-born children and their intended mother who is genetically related to them.[162]

However, **what happens to the other intended parent who is not genetically connected to the surrogate-born child**: does the ECHR require that the filiation between the child and that intended parent is also legally recognised in the State of origin (that is, the State to which the family returns)?

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[160] *Mennesson v. France*, App. no. 65192/11 (ECtHR, 2014) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145389%22]}). See, also, *Labassee v. France*, App. no. 65941/11 (ECtHR, 2014) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145180%22]}); *Foulon and Bouvet v. France*, App. no. 9063/14 (and 10410/14 (ECtHR, 2016) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-164968%22]}).

[161] C. Achmad, 'Children's rights to the fore in the European Court of Human Rights' first international commercial surrogacy judgments' (2014) European Human Rights Law Review 638.

[162] *D v. France*, App. no. 11288/18 (ECtHR, 2020) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-203565%22]}).

In its (first) **Advisory Opinion**[163] – which was a sequel to *Mennesson v. France* – the ECtHR was called to rule on the above question. In its Opinion, the Court stressed that the detrimental impact of non-recognition is not limited to the (intended) parents, but affects also the children, who are placed in a position of legal uncertainty regarding their identity within society. **The non-recognition of the bonds between the children and their intended mother can give rise to several difficulties**, such as that the children may be denied their mother's nationality, they may experience difficulties in remaining in their intended mother's country of residence, as well as in preserving their relationship with their mother in case of parental separation, and they may lose inheritance rights they would otherwise have enjoyed. The Court also focused on the **'*general and absolute* impossibility of obtaining recognition of the relationship',**[164] **which is incompatible with the best interests of the child that require that each situation be examined in the light of the particular circumstances of the case**. The Court then stressed that although the lack of European consensus on the issue would have pointed to a wide margin of appreciation being left for States, the margin ought to be reduced because the issue at stake involves particularly important facets of an individual's identity as well as 'essential aspects of the (children's) private life'.[165]

Accordingly, the Court concluded that **Article 8 ECHR should be read as requiring domestic law to make provision for the recognition of the parent-child relationship lawfully established abroad between the children and the intended parent who is not genetically connected to the children, in situations where one of the two intended parents *is* genetically connected to them.** The Court, nonetheless, also went on to note that although the uncertainty surrounding the children's status should be 'as short-lived as possible',[166] the choice of means by which to enable recognition falls within the State's margin of appreciation.[167] For this reason, it is not necessary that the State in which the family seeks recognition enters the foreign birth certificate into the register of births, marriages and deaths (and, thus, *automatically* recognises the mother-child relationship, as established abroad), but, rather, there are other acceptable forms of (subsequent) recognition, such as adoption. As noted by one commentator, the sole obligation that the Opinion imposes on States therefore is to **provide 'access to an effective procedural mechanism', which allows for the recognition of the legal relationship between the children and the intended mother,**[168] albeit not necessarily automatically.[169]

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[163] Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother, Request no P16-2018-001 by the French Court of Cassation (ECtHR, 2019) (https://hudoc.echr.coe.int/fre#%7B%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22ADVISORYOPINIONS%22],%22itemid%22:[%22003-6380464-8364383%22]%7D). The Opinion was confirmed in *C and E v. France*, App. nos. 1462/18 and 17348/18 (ECtHR, 2019) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-6589814-8731890%22]}) and *KK and others v. Denmark*, App. no. 25212/21 (ECtHR, 2022) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-221261%22]}).

[164] Advisory Opinion (n 163), para. 42 (emphasis added).

[165] Advisory Opinion (n 163), para 45.

[166] Advisory Opinion (n 163), para. 49.

[167] Advisory Opinion (n 163), para. 51.

[168] L. Lavrysen, 'The Mountain Gave Birth to a Mouse: The First Advisory Opinion under Protocol No. 16' (Strasbourg Observers, 24 April 2019), available here: https://strasbourgobservers.com/2019/04/24/the-mountain-gave-birth-to-a-mouse-the-first-advisory-opinion-under-protocol-no-16/.

[169] More recently, the Court followed the same reasoning and reached the same conclusion in a case involving a rainbow family (that is, a surrogate-born child and its intended parents who were a male, same-sex, couple in a registered partnership and one of them was not genetically related to the child) – see *D. B. and others v. Switzerland*, App. no. 58817/15 and 58252/15 (ECtHR, 2022) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-220955%22]}).

Therefore, through the above cases, the ECtHR has adopted a rather positive stance on the matter of the cross-border recognition of surrogacy arrangements, holding that **the right of a surrogate-born child to identity, which is an aspect of the child's private life, requires States to recognise the parent-child relationship not only between the child and the intended parent that is genetically connected to the child but, also, the other intended parent**.[170] However, the state of residence of the family – which is the state where recognition is sought[171] – does not need to provide for automatic recognition but, rather, it suffices if it makes provision for an effective procedural mechanism allowing for the recognition of the legal relationship between the child and the intended parents.[172]

3.5.3. The cross-border recognition of the parenthood of the children in rainbow families

The case ***A.D.-K. and others v. Poland***,[173] which is currently pending, **involves the refusal by an ECHR signatory State to legally recognise the parent-child relationship between a child and one of her parents as this was established abroad, on the ground that the parents were a same-sex couple**.

A.D.-K. (a Polish national – the first applicant) and S.D.-K. (a British national – the second applicant) are two women who live in the UK, where they have also registered their civil partnership. In 2011, the couple became parents: S.D.-K. gave birth to their daughter – L.D.-K. (the third applicant) – who was born at a hospital in London. The child acquired British citizenship and her birth certificate noted S.D.-K. as her mother and A.D.-K. as her parent. Subsequently, A.D.-K. and S.D.-K. applied to the Polish authorities to have the particulars of L.D.-K.'s birth certificate recorded in Poland. **The Polish authorities refused to transcribe the certificate, on the ground that it contravened the basic principles of the Polish legal system, due to the fact that it noted two persons of the same sex as the joint legal parents of the child**. Following this, the family appealed, and the case eventually reached the Supreme Administrative Court of Poland, which dismissed their appeal on the same grounds as were relied initially by the Polish authorities for refusing to transcribe the birth certificate. The applicants then lodged a case before the ECtHR.

Their complaints are as follows:

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[170] This seems to be in accordance, also, with Principle 2.2 of the Verona Principles (Principles for the protection of the rights of the child born through surrogacy), which provides that 'States shall ensure that every child born through a surrogacy arrangement, independent of circumstances leading to their birth, country of birth, status and legal parentage, can throughout their childhood claim and benefit from all rights provided in the Convention on the Rights of the Child and other international instruments, on an equal basis with all children. Particular attention should be paid to rights relating to birth registration and identity (including but not limited to name, nationality and family relations'. The Verona Principles – drafted by independent experts – were published by International Social Service (ISS) in 2021; ISS is an international NGO founded in 1924 and has as its aim to assist children and families confronted with complex social problems as a result of migration. The principles are not legally binding but identify the most problematic areas and provide normative guidance for the protection of the rights of children born through surrogacy. They are available here: https://www.iss-ssi.org/images/Surrogacy/VeronaPrinciples_25February2021.pdf.

[171] It should be noted that if recognition is refused in the State of nationality of the intended parent who is genetically related to the child (even though recognition has, already, been granted in the State of residence of the family) and the family does not reside in that State, this does not constitute a violation of the ECHR – see *S-H v. Poland*, App. nos. 56846/15 and 56849/15 (ECtHR, 2021) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-214296%22]}).

[172] Note, however, that in the absence of a biological link between the child and both of the intended parents, the Court has read the ECHR as not requiring recognition of filiation between a surrogate-born child and either or both of the intended parents – see *Paradiso and Campanelli v. Italy* [GC], App. no. 25358/12 (ECtHR, 2017) (https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-170359%22]}); and *D v. Belgium*, App. no. 29176/13 (ECtHR, 2014) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-155182%22]}).

[173] *A.D.-K. and others v. Poland*, App. No. 30806/15, lodged on 16 June 2015, communicated on 26 February 2019 (pending).

'1. The third applicant complains under Article 8 of the Convention that the **refusal to register her birth certificate in the Polish Civil Status Register has breached her right to private life**. She alleges that she remains in a state of uncertainty as regards her right to Polish citizenship and that this refusal has had consequences for her inheritance rights.

2. The first and second applicants complain under Article 8 of the Convention of a **breach of their right to private life, in particular their right to be considered parents**.

3. All applicants complain under Article 8 of the Convention of a **breach of their right to family life**.

4. The first and second applicants complain that they have suffered **discrimination contrary to Article 14 taken in conjunction with Article 8 of the Convention on grounds of their sexual orientation** because of the domestic authorities' refusal to register their child's birth certificate in the Polish Civil Status Register.'

The ruling of the Court in this case is awaited with great interest as it may provide a judicial solution to the problem of non-recognition faced by rainbow families in a cross-border context. **If the ECtHR will deliver a ruling requiring ECHR signatory States to recognise parenthood established abroad in situations involving rainbow families, this will resolve one of the gaps left by the *V.M.A.* case, in that EU Member States will be required (as a result of their ECHR membership) to recognise the parent-child relationship between a child and both of its same-sex parents *for all legal purposes*** (e.g. for inheritance purposes, for taxation purposes, for maintenance purposes, for custody or the right of parents to act as legal representatives of the child such as in issues relating to schooling or health matters, for the receipt of social and other benefits which do not fall within the scope of EU law, and so on), **and not only for enabling them to exercise rights deriving from EU law**.

3.6. The HCCH: a potential solution?

At **international level, there is currently no legal instrument concerned with the cross-border recognition of parenthood**. **Nonetheless, a similar initiative to the one recently undertaken by the Commission has been in preparation for several years by the HCCH**. The latter is a global intergovernmental organisation the mandate of which is 'the progressive unification of the rules of private international law'. All 27 EU Member States, as well as the EU itself,[174] are members to the HCCH, with the EU leading the negotiations for its Member States in it. Since its inception, the HCCH has adopted over 40 Conventions and instruments.[175]

To date, no Convention or instrument adopted under the auspices of the HCCH concerns the cross-border recognition of parenthood. Nonetheless, pursuant to a mandate of its Members, the Permanent Bureau of the HCCH conducted research between 2010 and 2015 specifically on the issues arising from the non-recognition of parenthood in cross-border situations. On this basis, an **Experts' Group was set up in 2015 to explore the feasibility of adopting a (binding) convention on legal parentage and a separate optional (binding) protocol on legal parentage established as a result of**

[174] Council Decision 2006/719 on the Accession of the Community to the Hague Conference on Private International Law [2006] OJ L 297/1. The full text of the Decision is available here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006D0719.

[175] The core Conventions and instruments of the HCCH can be found here: https://www.hcch.net/en/instruments/conventions.

international surrogacy arrangements.[176] The Experts' Group had annual meetings from 2016 until 2021 (and, in some years, met twice) and it delivered its **final Report in November 2022**, which is entitled 'The feasibility of one or more private international law instruments on legal parentage' (in the remaining of this chapter, this will be referred to as 'the Report').[177] Upon its publication, the Report was **submitted to the HCCH** Council on General Affairs and Policy for consideration at its meeting in spring 2023, which will take a decision as to possible future work in this area. If – and when – the above instruments will be adopted, these will be applicable to all EU Member States and the EU through their HCCH membership.

The **Report explains the main issues that arose during the discussions at the Experts' meetings and summarises the main conclusions that have been reached**; the basic aspects of these will, therefore, be summarised in the next few pages.

Conclusion 1 of the Report states that the Experts' Group worked with the understanding that the **aim of any new instruments would be to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights**.

The Report points out that to be feasible, both the Convention and the Protocol should **apply to the legal parentage of a person regardless of age**.[178] It also points out that the **scope of the proposal will affect overall feasibility: a very restrictive scope will risk not addressing the lack of recognition of the legal parentage of many children, whereas a very broad scope will make it very difficult to achieve consensus among States**.[179] For this purpose, the Report suggests that 'the recognition of legal parentage under a Convention or a Protocol would be limited to the personal status, i.e., of the parent-child relationship, and that the child would therefore have the same legal parents in the States Parties concerned. The recognition of the personal status under either instrument would not include the recognition of any legal effects that are attached to the parent-child relationship nor settle the question of what rights and obligations the child or parents had as a result of that relationship'.[180]

Conclusion 3 of the Report stresses that to be feasible, the Convention will need to **exclude legal parentage established as a result of international surrogacy arrangements** (though these will be covered by the separate Protocol) **and legal parentage established by intercountry adoption** (in order not to undermine the 1993 Intercountry Adoption Convention).

Conclusion 4 focuses on the **rules regarding legal parentage established by a judicial decision**. In view of the fact that legal parentage is most often established by operation of law or following an act (and not with a judicial decision), the Experts' Group considers that it is imperative that **the Convention includes also rules for legal parentage established by operation of law or following an act**.[181] Conclusion 5 notes that 'rules on uniform applicable law or the recognition of legal parentage as a status would be needed'.

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[176] Unlike the European Commission, which has chosen the term 'parenthood' for the proposed Regulation, the HCCH uses the term 'parentage' instead.

[177] The reports of the meetings of the Experts' Group as well as the final report can be found here: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy .

[178] Para. 22 of the Report (n 177).

[179] Para. 21 of the Report (n 177).

[180] Para. 24 of the Report (n 177).

[181] Para. 53 of the Report (n 177).

Conclusion 6 of the Report then considers the **rules that should be included in the Convention with regard to legal parentage recorded in a public document**. Among the possible options suggested is to consider including rules on an **international certificate** as a translation aid and/or to specify the effects of the public document in the issuing State.

Regarding the **optional (binding) protocol on legal parentage established as a result of international surrogacy arrangements**, the Report notes that **it can follow either an a priori approach**, which would require the involvement of authorities in the State of habitual residence of the surrogate and that of the intended parent(s) before the conclusion of the surrogacy agreement until the recognition of legal parentage; **or an a posteriori approach**, which would not require State authorities to be involved prior to, and as part of, an international surrogacy arrangement; **or a combined a priori and a posteriori approach**, meaning that the Protocol would follow an a posteriori approach and States that so wish could opt-in or opt-out of a separate chapter to implement an a priori approach.[182] In relation to the most feasible of the three approaches, Conclusion 10 points out that 'Experts believed that a number of States might be attracted to an *a priori* model on the basis that it would better protect human rights. However, experts also concluded that because of the elaborate cross-border cooperation mechanisms, the higher degree of public authority involvement required in an *a priori* approach (both for States that regulate and those that prohibit surrogacy), and because it would imply acceptance of these practices before they have occurred, an *a posteriori* model would be more feasible'.

In addition, Conclusion 14 of the Report explains that there was a general agreement among the Experts that to be feasible, **the Protocol will need to include safeguards/standards**, though there were different views regarding which safeguards/standards to include, how they should be included, and how they should feature (for instance, as State-specific safeguards, as uniform safeguards, and so on).

If the HCCH proceeds with the adoption of the Convention and the Protocol, this can constitute a solution to the problems of non-recognition faced in EU Member States. However, it should be noted that the project is in its preparatory phase and may take some time before a binding instrument may be prepared, agreed by members, and – if at all – be widely ratified, including by *all* EU Member States.[183]

3.7. Conclusions

This chapter had as its aim to examine how **the existing legal framework provides *partial* solutions to the problem of non-recognition of parenthood by EU Member States in cross-border situations**. The analysis presented the solutions currently offered by EU law, in particular the *V.M.A.* case, which requires the cross-border recognition of parenthood established *in a Member State for the purpose of the exercise of rights derived from EU law*, as well as Regulation 2016/1191, which simplifies the requirements for presenting certain public documents (including documents establishing or evidencing parenthood) in the EU, without however requiring the cross-border recognition of the *content* of those documents. It was also explained that the EU itself has unified certain aspects of the private international law of the Member States by introducing instruments devoted to specific aspects of private international family law (such as succession, parental responsibility, maintenance). However,

[182] Paras. 87-92 of the Report (n 177).

[183] For an explanation of why these (potential) instruments are unlikely to constitute a wholesome solution to the problem of non-recognition of parenthood see D. A. J. G. de Groot (n 12), pp. 379-380.

none of these instruments covers the establishment and recognition of parenthood and hence the current framework of EU private international law includes a gap with regard to this matter. The chapter, then, analysed the ECtHR case-law that imposes obligations on all EU Member States – due to their status as signatory States of the ECHR – to recognise parenthood validly established under the law of another State, which thus constitutes another (partial) solution to the non-recognition of filiation in cross-border situations. Finally, the chapter examined the current work of the HCCI, which may lead to the adoption of two binding instruments that will aim at securing the cross-border recognition of parenthood at an international level. Of course, whether – and if yes, to what extent – these instruments will offer a complete or partial solution to the problems of non-recognition of parenthood currently encountered in Member States will depend, first, on whether any steps will be taken to introduce these instruments and, second, on the final form that these instruments will take.

The analysis in this chapter leads us to the conclusion that **none of the above developments appears to offer a wholesome solution to the problem of non-recognition of parenthood by Member States. Accordingly, the proposal under examination in this study appears to constitute the only real prospect of filling the gap in legal protection regarding the issue of cross-border recognition of parenthood in the EU.**

4. THE BACKGROUND OF THE PROPOSAL

KEY FINDINGS

- The question of the **cross-border recognition of civil status**, including of parenthood, has been **on the agenda of EU institutions for over a decade**.
- However, it is **only in the last few years** (mainly from 2020 onwards) that there has been a **clear desire on the part of (at least) two EU institutions** - the European Parliament and the Commission - **for an EU instrument** that will guarantee the cross-border recognition of the parenthood of all children within the EU.
- In her State of the Union address in September 2020, the **Commission President** noted her intention to push for **mutual recognition of family relations** in the EU, emphasising that **'if you are parent in one country, you are parent in every country'**.
- In early 2021, the Commission began working on a proposal for a Regulation which would guarantee the cross-border recognition of parenthood within the EU. For this purpose, it established a **Commission inter-services steering group** (ISSG) for working on the initiative.
- In preparation of its proposal, the Commission launched **extensive consultations** in 2021 and 2022 covering all Member States (with the exception of Denmark), as well as a wide range of stakeholders, such as NGOs, registrars, and representatives of the Member States. It also organised an OPC.
- The Commission also set up an **Expert Group** to provide it with expert advice on matters relating to the proposal.
- **ICF** (an external contractor) was commissioned to **support the preparation of the Impact Assessment report** and to organise a number of **additional consultation activities**.
- The consultations, reports, feedback activities, and discussions organised by the Commission when preparing its parenthood initiative led to the following **conclusion**: that **there is, indeed, a problem in the EU with the non-recognition of parenthood in cross-border situations; that this problem has a serious negative impact on children's welfare and on the enjoyment of their fundamental rights; that there is, therefore, a clear need for action at EU level; and that the form that this action must take is that of a binding legal instrument and, in particular, of a Regulation**.

4.1. Introduction

The **aim of this chapter is to consider the steps that have led to the preparation and the publication of the proposal** that is under examination in this study. For this purpose, the chapter will begin by considering the first calls made by different EU institutions for a solution to the problem of non-recognition of parenthood in the EU (Section 4.2.). It will, subsequently, be seen that some more concrete calls have been made since 2020, which have focused on the need for an instrument that will guarantee the cross-border recognition of parenthood within the EU; these calls have, in fact, led to the launch of the Commission's initiative on parenthood, which has culminated in the adoption of the proposal under examination (Section 4.3.). Finally, Section 4.4. will describe the steps that have been taken by the Commission from the moment that it announced its intention to submit a proposal for a Regulation on the cross-border recognition of parenthood until the latter's publication in December 2022.

4.2. Early calls for a solution to the problem of non-recognition of parenthood in the EU

The question of the **cross-border recognition of** civil status, including of **parenthood, has been on the agenda of EU institutions for over a decade**.[184]

In its **Stockholm programme**,[185] published in 2010, the European Council noted that 'the Commission could submit appropriate proposals taking into account the different legal systems and legal traditions in the Member States. In the short term a system allowing citizens to obtain their own civil status documents easily could be envisaged. **In the long term, it might be considered whether mutual recognition of the effects of civil status documents could be appropriate, at least in certain areas**.'[186] Following this, in its '**Action Plan Implementing the Stockholm Programme'**,[187] the Commission pointed out that 'Union law can facilitate mobility and empower citizens to exercise their free movement rights. For international couples, it can reduce unnecessary stress when they divorce or separate and **can remove the current legal uncertainty for children and their parents in cross-border situations**. **It can help eliminate barriers to the recognition of legal acts and lead to the mutual recognition of the effects of civil status documents'**.[188]

In the same year, in its **Green Paper 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records'**[189] – mentioned also in chapter 3 of this study – the Commission considered the position of **Union citizens that exercise their free movement rights** and noted that there are **two types of problems that they face**: a) uncertainty regarding the recognition of their civil status documents or judicial documents when they seek to present them in a Member State other than the one in which they were issued and b) the refusal of Member States to recognise the *effects* (that is, the content) of such documents issued in other Member States. In the Green Paper, both the option of automatic recognition of the *content* of the documents and the recognition (*of the content*) based on the unification of the private international law rules were proposed as possible solutions. Nonetheless, **the only action that was taken in response to the Green Paper** – the promulgation of Regulation 2016/1191,[190] which was seen in chapter 3 of this study – did not follow either of these options but, **simply, secured the cross-border recognition of the documents themselves but not of their content**.

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184 This question has, also, been the subject-matter of a PhD thesis completed in 2010 – see K. J. Saarloos, *European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage*, PhD Thesis, University of Maastricht (2010), available at https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/887335/guid-172932e6-fb2d-4fde-a78e-64f131c0d803-ASSET1.0.pdf.

185 European Council, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ C 115/01. The full text of the document is available here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52010XG0504%2801%29.

186 The Stockholm Programme (n 185), s. 3.1.2.

187 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme' COM(2010) 171 final. The full text of the Communication is available here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2010:0171:FIN.

188 Action Plan Implementing the Stockholm Programme (n 187), s. 4.

189 (n 109).

190 (n 49).

In 2017, the **European Parliament** adopted a **resolution, recommending to the Commission to draft a proposal for a Regulation requiring the cross-border recognition of adoption orders**.[191] The resolution noted the absence of a European provision for the recognition – whether automatic or otherwise – of domestic adoption orders,[192] which caused 'significant problems for European families who move to another Member State after adopting a child, as the adoption may not be recognised'.[193] After pointing out some of the problems that may be faced by families as a result of such non-recognition,[194] the resolution proceeded to note that 'it is therefore of the utmost importance to adopt legislation providing for the automatic recognition in a Member State of a domestic adoption order granted in another Member State, on condition that full respect for national provisions on public policy and for the principles of subsidiarity and proportionality is ensured'.[195] **This resolution, nonetheless, did not lead to the adoption of a new legal instrument**.

4.3. The calls for a proposal

In this section of the study, the steps that led to the announcement of the parenthood initiative by the Commission - which culminated in the adoption of the proposal under examination in this study – will be presented. It will be seen that although the first push for this legislative proposal has come from EU initiatives that had as their aim to protect the rights of rainbow families, subsequently measures that had as their aim to protect, respect, and promote the rights of the child also mentioned the need for the adoption of such an initiative.

In her **State of the Union address in September 2020**,[196] the **President of the Commission** Ursula von der Leyen noted that she 'will not rest when it comes to building a Union of equality', a 'Union where you can be who you are and love who you want – without fear of recrimination or discrimination'. For this purpose, she stated that the Commission would soon put forward a strategy to strengthen LGBTIQ rights – a promise that materialised two months later, when the Commission published its first ever LGBTIQ Equality Strategy.[197] The Commission President also noted that '[a]s part of this, **I will also push for mutual recognition of family relations in the EU. If you are parent in one country, you are parent in every country**'. This was the first statement by the Commission indicating its intention to take action to ensure the mutual recognition of family relations in the EU.

The LGBTIQ Equality Strategy 2020-2025 that followed the above statement and was published in November 2020, **identified the problems of non-recognition faced by rainbow families when exercising their free movement rights under EU law**: '[n]ational legislation in over half the Member States contains provisions applying to rainbow parents. However, and despite existing EU law as

[191] European Parliament resolution of 2 February 2017 with recommendations to the Commission on cross border aspects of adoptions (2015/2086(INL)) 2018/C 252/02. The full text of the resolution is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017IP0013. Attached to the Resolution was an Annex which contained detailed recommendations for the Regulation.

[192] European Parliament resolution on cross border aspects of adoptions (n 191), recital U.

[193] European Parliament resolution on cross border aspects of adoptions (n 191), recital V.

[194] European Parliament resolution on cross border aspects of adoptions (n 191), recitals W, X, Y.

[195] European Parliament resolution on cross border aspects of adoptions (n 191), recital AB. See, also, paras 23-26 of the resolution. For numerous earlier calls made by the European Parliament for the adoption of measures that would ensure the cross-border recognition of adoptions see https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-cross-border-aspects-of-adoptions.

[196] (n 5).

[197] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM(2020) 698 final. The full text of the Communication is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0698.

interpreted by the Court of Justice, when these families travel or move to other Member States, there is sometimes a risk of children's link to their LGBTIQ parent(s) being severed, which may have an impact on the children's rights.'[198] This statement was followed by a footnote,[199] which noted that '[l]ack of mutual recognition of child-parent relationships may lead to children being denied citizenship, a name or inheritance rights. Moreover, unrecognised parents may be unable to act as their children's legal representatives, travel alone with them, enrol them in schools, provide health insurance, open a bank account or consent to medical interventions'. Accordingly, **the Commission proceeded to state that it 'will push for mutual recognition of family relations in the EU. If one is parent in one country, one is parent in every country.'**

The subsequent year, in its **resolution of 14 September 2021 on LGBTIQ rights in the EU**, the **EP called on the Commission to ensure that all EU Member States respect continuity in law as regards the family ties of members of rainbow families moving to their territory from another Member State**,[200] **and to propose legislation requiring all Member States to recognise, for the purposes of national law, the adults mentioned on a birth certificate issued in another Member State as the legal parents of the child, regardless of the legal sex or the marital status of the adults**. [201]

The above statements constitute the very first steps that prepared the ground for the proposal under examination in this study. It should be emphasised, nonetheless, that although the first statements regarding this proposal originated as part of a broader promise to achieve LGBTIQ equality, **the proposal was never intended merely to cover situations involving the recognition of parenthood of the children of same-sex parents**: the **Commission's intention from the beginning was to ensure that *all families* would benefit from the proposed legislative initiative and, as we shall see in the next chapter, the first published draft of the legislative proposal has kept true to this intention**. Thus, although rainbow families are especially vulnerable to refusals of recognition of parenthood,[202] all families that may be faced with the danger of non-recognition of parenthood when seeking to claim such recognition in a cross-border context stand to benefit from the proposed instrument.

Hence, rather than being merely an instrument that aims to protect the rights of rainbow families, the proposal, as noted in the press release announcing its publication, is focused on furthering the best interests and the rights of the child,[203] and, thus, **puts the best interests of the child at its core**. This does not come as a surprise as in the EU's first Strategy on the Rights of the Child, published in 2021, the Commission stated as one of the key actions to be taken by it to 'propose in

198 LGBTIQ Equality Strategy 2020-2025 (n 197), section 3.2.

199 LGBTIQ Equality Strategy 2020-2025 (n 197), footnote 64.

200 European Parliament resolution of 14 September 2021 on LGBTIQ rights in the EU (2021/2679(RSP)), para. 7. The full text of the resolution is available here: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0366_EN.html.

201 European Parliament resolution on LGBTIQ rights in the EU (n 200), para. 8. In an earlier resolution (European Parliament resolution of 7 February 2018 fighting discrimination of EU citizens belonging to minorities in the EU Member States (2017/2937(RSP)), the Parliament urged 'the Commission to ensure that Member States correctly implement the Free Movement Directive, consistently respecting, inter alia, the provisions related to family members and prohibiting discrimination on any grounds' (para. 20) and called on the Commission 'to take action in order to ensure that LGBTI individuals and their families can exercise their right to free movement in accordance with both Article 21 of the TFEU and Article 21 of the EUCFR' (para. 21). The full text of the resolution is available here: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0032_EN.html.

202 See the study 'Obstacles to the Free Movement of Rainbow Families in the EU' (n 38).

203 Press release: 'Equality Package: Commission proposes new rules for the recognition of parenthood between Member States', Brussels, 7 December 2022 available here: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_7509 .

2022 a horizontal legislative initiative to support the mutual recognition of parenthood between Member States',[204] whilst it also invited the Member States to, inter alia, 'enhance cooperation in cases with cross-border implications, to ensure the full respect of the rights of the child',[205] given that '[s]pecific challenges arise in cross-border situations, - including for families with divorced or separated parents, and for rainbow families'.[206] Moreover, the European Parliament, in its resolution on children's rights in view of the EU Strategy on the rights of the child, highlighted 'the importance of the child's best interests in cross-border family litigation', called on the 'national authorities to recognise and enforce judgments delivered in another Member State in child-related cases', and called 'for the EU, its agencies and the Member States to end childhood statelessness both within and outside the EU' by, inter alia, 'promoting and ensuring universal access to birth registration and certification regardless of the parents' status, including for LGBTIQ+ families'.[207] In addition, in its resolution on the protection of the rights of the child in civil, administrative and family law proceedings, the same institution 'welcome[d] the Commission's announcement to put forward a legislative proposal to facilitate mutual recognition of parenthood between Member States'.[208]

Accordingly, **in the last few years, there has been a clear desire on the part of (at least) two EU institutions - the European Parliament and the Commission - for an EU instrument that will guarantee the cross-border recognition of the parenthood of all children within the EU**. Hence, it comes as no surprise that the intention of working on an initiative on the recognition of parenthood between Member States was also included in the 2022 Commission Work Programme under the policy ambition of 'A New Push for European Democracy'.[209] The Commission, therefore, in early 2021 began working on a proposal for a Regulation to guarantee the cross-border recognition of parenthood within the EU.

4.4. The steps taken by the Commission in preparation of the proposal

The Commission began work on the proposal in February 2021, when a Commission inter-services steering group (ISSG) was established for working on the initiative. The group – comprised of the Legal Service (SJ), Secretariat-General (SG) and the Directorate-General Justice and Consumers (DG JUST) – was chaired by DG JUST. As noted in the Commission's Impact Assessment report, the ISSG met three times in the period from March 2021 to November 2021 and approved the IIA on 30 March 2021.[210]

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[204] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'EU strategy on the rights of the child', COM(2021) 142 final, p. 14. The full text of the Communication is available here: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52021DC0142.

[205] EU strategy on the rights of the child (n 204), p. 16.

[206] EU strategy on the rights of the child (n 204), p. 13.

[207] European Parliament resolution of 11 March 2021 on children's rights in view of the EU Strategy on the rights of the child (2021/2523(RSP)), paras. 22-23. The full text of the resolution is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021IP0090.

[208] European Parliament resolution of 5 April 2022 on the protection of the rights of the child in civil, administrative and family law proceedings (2021/2060(INI), para. 25. The full text of the resolution is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022IP0104.

[209] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission work programme 2022: Making Europe stronger together COM(2021) 645 final, pp. 3 and 10. The full text of the Communication is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0645.

[210] (n 11), p. 48.

Hence, **the first main step that the Commission took in the preparation of this initiative was the publication of the IIA**, which has already been mentioned (and parts of it quoted) in other parts of this study.[211] The IIA stressed that '[f]amilies are increasingly mobile as they move and travel between Member States. Yet, given the differences in Member States' substantive and conflict rules on parenthood, and the fact that there are no Union conflict rules on parenthood or Union rules on the recognition of judgments on parenthood between Member States, families may face difficulties in having the parenthood of their children recognised when crossing borders within the Union'. The document summarised the existing legal context (national and international) on the cross-border recognition of parenthood, explained what is the problem (and its causes) that the proposed initiative aims to tackle, and stated what is the chosen legal basis for the instrument and why the choice to adopt such a measure complies with the principle of subsidiarity. It also identified the specific[212] and general[213] objective of the initiative, and the different policy options available, namely, the baseline scenario whereby no action would be taken at Union level, the adoption of soft law measures, and the adoption of a legislative measure in the form of a Regulation, with the chosen option being the latter.[214] T**he document concluded with summarising the expected impacts of the proposed Regulation**: it will **save** families the **legal costs, time and burden of lengthy judicial proceedings on recognition**, it will introduce **legal certainty** in relation to the recognition of parenthood in cross-border situations **that will facilitate significantly the right to free movement of children with their parents within the Union** and will significantly **increase the welfare of children**, and it will **support the protection of the rights of the child in accordance with international and Union law and will help children maintain all their rights in cross-border situations**. It will also significantly **reduce administrative burden and costs for citizens, national administrations and national judicial systems**.

The **Commission collected feedback to the IIA, which was published in April 2021**.[215] The feedback consisted of 760 responses from a wide range of stakeholders, such as EU and non-EU citizens, academic and research institutions, business associations, NGOs and other organisations, whilst geographically, the majority of respondents came from Central Europe. The Commission noted that the 'overall tendency of the received feedback was negative'.[216] Some respondents disagreed with the Commission's intention to adopt a legislative measure on the ground of lack of EU competence and/or given the sensitivity of the area, with some of those respondents pointing out that 'parenthood should only be recognised in cases where the family is composed of opposite-gender parents'.[217] With regard to surrogacy, mixed opinions were expressed.[218] Other respondents, nonetheless, viewed the initiative much more positively, highlighting that it 'would be crucial to ensuring children's rights and fundamental rights' and considering that it would be important 'in guaranteeing *non-discrimination* and facilitating *free movement* in the EU. Other respondents pointed out that this initiative is crucial for the *protection of child's fundamental rights*.'[219]

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[211] (n 22).

[212] '[T]o facilitate the recognition of parenthood by laying down common conflict rules on parenthood as well as common rules on the recognition of judgments on parenthood.'

[213] '[T]o create, maintain and develop an area of freedom, security and justice in which the free movement of persons is ensured, in particular for children with their parents when the family travels within the Union or takes up residence in another Member State'.

[214] These options were assessed in detail in the ICF S.A. Final Report (n 14), pp. 58-92.

[215] For a short summary see the Commission's Impact Assessment report (n 11), pp. 58-59.

[216] Impact Assessment report (n 11), p. 58.

[217] Impact Assessment report (n 11), p. 58.

[218] Impact Assessment report (n 11), p. 59.

[219] Impact Assessment report (n 11), p. 59.

To assist it in the preparation of the proposal, the Commission in 2021 set up an Expert Group on the recognition of parenthood between Member States to receive expert advice on matters relating to the proposal. Its membership consisted of 12 individual experts appointed in their personal capacity,[220] plus 5 organisations (EVS,[221] HCCH, NELFA, ILGA-Europe, and UNICEF) having an observer status. As stated on the relevant webpage,[222] the Group's mission was, inter alia, 'to help the Commission to analyse: (i) the problems faced by families in cross-border situations caused in the absence of Union legislation on the recognition of parenthood between Member States; (ii) the scope of a possible Union's legislative instrument on the recognition of parenthood between Member States; (iii) the existing relevant national, European and international law on parenthood, nationality, free movement and the rights of the child'. The same webpage notes that the task of the Expert Group was to 'assist the Commission in the preparation of legislative proposals and policy initiatives'.

In 2021 and early 2022 the Commission held seven meetings with the experts, which – as noted in the Impact Assessment report – helped to inform the development of policy options, especially the legislative ones.[223] Among the matters discussed in these meetings were the terminology to be used (i.e. whether the term 'parenthood', 'parentage', or (the more child-focused) 'filiation' should be used in the proposed legislative instrument); whether the word 'child' should be used in the instrument's title, to emphasise the child-centred nature of the initiative; the territorial scope of the proposed Regulation (i.e. whether it should cover only documents issued by the authority of a Member State or also documents issued by the authority of a third country but subsequently recognised in a Member State); whether the same conflict rules should apply to the establishment of parenthood at the time of birth and to the establishment of parenthood of an adult; whether the provisions of the proposed Regulation should apply to the recognition of court decisions and administrative documents concerning parenthood regardless of the date of their issuance or whether the proposed Regulation should only apply to such documents if they are issued after the date of application of the instrument; whether the recognition in another Member State of the parenthood of a child born out of surrogacy should be included in the scope of the proposed Regulation; whether grounds of jurisdiction should be differentiated for specific methods of the establishment of parenthood, such as in cases of domestic adoption or surrogacy; and whether a reference should be included in the proposed Regulation to the child's right to know its origins and the Member States' obligation to keep an adequate system of data recording and access rights.

In addition, **in preparing the proposal, the Commission launched extensive consultations in 2021 and 2022 covering all Member States with the exception of Denmark**, which – as will be explained in chapter 6 – does not take part in measures adopted under Article 81 TFEU, which is the legal basis that was chosen to be used for the proposed Regulation. As noted in the Explanatory Memorandum accompanying the proposed Regulation, the 'consultations targeted a wide range of stakeholders representing citizens, public authorities, academics, legal professionals, NGOs and other relevant interest groups',[224] and consisted of public feedback to the IIA (see above),[225] an OPC (see below), a

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220 The author of this study served as an individual expert in the Group, appointed in her personal capacity.

221 Europäischer Verband der Standesbeamtinnen und Standesbeamten e.V. (EVS) - this is the European Association of Registrars.

222 https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&do=groupDetail.groupDetail&groupID=3765.

223 Impact Assessment report (n 11), p. 50.

224 Explanatory Memorandum attached to the proposal (n 2), p. 7.

225 This was collected in the period between 14 April 2021 to 12 May 2021 and can be found here: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12878-Cross-border-family-situations-recognition-of-parenthood/feedback_en?p_id=23845772&page=1.

meeting with stakeholders and representatives of the civil society (on 14 December 2021),[226] and a meeting with experts of the Member States' authorities (on 25 January 2022).[227] The Explanatory Memorandum to the proposed Regulation pointed out that '[o]verall, stakeholders representing children's rights, rainbow families, legal practitioners and civil registrars favoured that the Union should address the current problems with the recognition of parenthood by adopting binding legislation. In contrast, organisations representing traditional families and those advocating against surrogacy were generally critical of a legislative proposal. The views of the public varied'.[228] As regards the meeting with Member States' authorities, more than half of participating Member States did not express their views concerning the initiative. There were two trends in the responses regarding the desirability of a legislative measure: first, a majority of those that intervened in the meeting supported legislation, especially in view of the increasing number of cross-border families that may experience problems with the recognition of parenthood; second, some Member States adopted a sceptical position towards legislation, being either of the opinion that problems with the recognition of parenthood in the EU are not significant or that their national law addresses them sufficiently.

The **OPC, which was launched by the Commission in its 'Have your say' portal in May and remained open until 25 August 2021, had as its aim to gather input and feedback from citizens and organisations**. It aimed to identify the problems that can arise in cross-border situations where parenthood is not recognised and to collect views on the desirability of a possible EU-level initiative on the recognition of parenthood between Member States. A total of 390 responses were received, which were analysed by an external contractor (ICF) and presented in a detailed summary report published by DG JUST in October 2021.[229]

The Commission, also, summarised the responses to the OPC in its Impact Assessment report.[230] It noted that most respondents were aware of instances where parenthood established in a Member State was not recognised in another Member State and were of the view that the current *status quo* is a serious problem, whereas a minority were not aware of such instances of non-recognition and did not consider the current *status quo* to be a problem. As regards the procedural hurdles in the procedures for the recognition of parenthood, the majority of respondents indicated that the main problem was that the procedures before administrative authorities were excessively lengthy, taking between 12 and 24 months, whilst the average estimated costs for recognition procedures varied significantly from being free of charge to reaching 12.000 EUR in some cases; in some cases, there was a requirement that cases should be brought to court, with 27% indicating that the estimated length of court proceedings was more than two years and the costs ranging between 0 and 25.000 EUR. Regarding the reactions to the possible EU initiative to facilitate cross-border recognition, the majority of respondents agreed to the Commission proposing a legislative initiative, however, a considerable minority (33%) disagreed, mostly on the ground that parenthood should be regulated only at Member State level. Nonetheless, regardless of their views on the possible adoption of EU legislation on the recognition of parenthood, most of the respondents considered that the EU should play a role in promoting cooperation on the matter between public authorities, with a minority (30%) indicating that the EU should play no role in such matters. The introduction of a European Certificate of Parenthood

[226] For a summary of the feedback received during the meeting with the stakeholders see the Commission's Impact Assessment report (n 11), pp. 59-60.

[227] For a summary of the feedback received during the meeting with the stakeholders see the Commission's Impact Assessment report (n 11), pp. 60-61.

[228] Explanatory Memorandum attached to the proposal (n 2), p. 8.

[229] The summary report is available here https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12878-Cross-border-family-situations-recognition-of-parenthood/public-consultation_en.

[230] (n 11), pp. 56-58.

(ECP) also received support from the majority of respondents, though 37% indicated that they would not support it as the currently available national documentation is sufficient. Finally, the majority of respondents indicated that the proposed legislation 'would have a very positive impact on children's fundamental rights and welfare (including emotional and psychological wellbeing) and in facilitating the exercise of the right of children to travel and move within the EU with their families'; that legal certainty, for both families and public authorities, would be ensured; and that the legislation would decrease the costs, time and burden for families as well as for national judicial systems.[231]

In addition to the consultation activities conducted by the Commission itself, further consultations were also undertaken by ICF (an external contractor), which was commissioned to support the preparation of the Impact Assessment report. These consultations consisted of online surveys addressed to Member States' civil and population registrars, written questionnaires to Member States' ministries and the judiciary, and interviews with the Member States' judiciary and NGOs.[232] ICF conducted a study that led to the publication of a **Report** to support the preparation of the Commission's Impact Assessment report (references to the findings of this Report have been made throughout this study).[233] In addition to an analysis of the consultations, the Report also included an extensive overview of the law and practice concerning, among others, the national substantive law and private international law rules relating to parenthood of the Member States. As noted in the Report, its general objective was 'to provide DG JUST with evidence and analysis to enable it to carry out an impact assessment for a possible legislative initiative to facilitate the recognition of parenthood between Member States. More specifically, it seeks to identify and analyse existing problems stemming from the absence of harmonised rules on the recognition of parenthood between Member States and assess, based on the results of legal, statistical, and empirical analysis, the impact of all policy options (POs) envisaged.'[234] The Report is comprised of five sections: (1) introduction; (2) overview of the key and wider contexts for the study, covering civil status and identity matters; (3) analysis of the problems identified with regard to the cross-border recognition of parenthood; (4) presentation of the rationale for EU action; and (5) analysis of the objectives of potential EU action, a description of the POs retained and the expected impact of those POs. It is also accompanied by several annexes.

The ICF Report noted that '[t]he goal of the consultation was to ensure that all relevant stakeholders at EU, national and international level were given an opportunity to express their views on the possible Union legislative initiative on the recognition of parenthood between Member States. The consultation relied on a mix of methods and tools to ensure a comprehensive and representative collection of views and experiences.'[235] The strategy centred on consulting three stakeholder categories: EU-level officials (EU institutions and agencies – for instance, the Fundamental Rights Agency), national authorities dealing with parenthood matters (national ministries, registration authorities, such as civil and population registrars, and judiciary representatives), and NGOs at national and EU level, such as NELFA and ILGA.

The consultations were analysed in detail in Annex 2 of the Report. The analysis included a summary of the results of the OPC launched by the Commission in 2021 (seen earlier in this section), as well as a summary of the responses to the online survey organised by ICF, which was completed by members of registration authorities of the Member States, such as civil and population registrars, and

[231] Impact Assessment report (n 11), p. 58.

[232] See Annex 2 accompanying the ICF S.A. Final Report (n 14).

[233] ICF S.A. Final Report (n 14).

[234] ICF S.A. Final Report (n 14), p. 5.

[235] ICF S.A. Final Report (n 14), p. 113.

had as its aim to clarify the current position in the different Member States regarding the establishment, registration and recognition of parenthood as well as to receive the views of registrars on a possible EU initiative to facilitate cross-border recognition of parenthood. The analysis also included a summary of the responses to the written questionnaire targeting national ministries dealing with parenthood matters – developed by ICF in collaboration with DG JUST – which aimed to gather information about current practices on the establishment and recognition of parenthood in the Member States, as well as a summary of the responses to targeted interviews with EU level officials (which aimed to provide a deeper understanding of the problems faced by families and children), with national and European NGOs, and with judiciary representatives.

The summary of the responses to the written questionnaire targeting national ministries dealing with parenthood matters, sheds light on the problems linked to the cross-border recognition of parenthood (see chapter 2 of this study) **and indicates that the majority of ministry representatives believe that the existing problems linked to the recognition of parenthood will evolve in the absence of legal initiatives and are likely to worsen in the future**.[236] According to most of the ministries, the main way to solve or mitigate the existing problems linked to the recognition of parenthood between Member States is through the harmonisation of Member States' legislation on the recognition of parenthood and the adoption of common rules, whilst other possible solutions are the promotion of cooperation between national authorities, the provision of up-to-date information/inventory of the rules applied on the matter of parenthood in Member States and the adoption of a common instrument for parenthood, namely, a European Certificate of Parenthood.[237] What is more, the majority of ministries believed that it is the EU that should act in order to solve or mitigate the existing problems with the cross-border recognition of parenthood.[238] In terms of the expected impacts of an instrument such as the proposed Regulation, the ministry representatives anticipate all examined areas to be positively impacted:[239] 'a substantial majority of respondents believe that EU legislation would have a positive impact on the cost, time and burden related to administrative procedures on the recognition of parenthood for national administrations and for citizens, as well as the cost, time and burden related to court proceedings on the recognition of parenthood for national judicial systems and for citizens. In addition, a positive impact is anticipated for legal certainty for national administrations (and simplification of their procedures for the recognition of parenthood) and for families (in relation to parenthood of their children in another Member State). In addition, children's fundamental rights (e.g. the right to a family life and the right to non-discrimination) and children's welfare (including their emotional and psychological well-being) would be positively impacted by EU legislation. Finally, a majority of respondents also expect positive impacts of EU legislation on facilitating the exercise of the right to free movement within the EU of children with their families'.

As regards feedback provided by NGOs, the ICF Report notes that '[t]he majority of respondents believe that the Union should intervene in facilitating the cross-border recognition of parenthood, as opposed to leaving recognition to the national law of Member States. By contrast, two respondents specified that the EU should not intervene in this matter, as it is within the national competence of Member States. All of those stating that the EU should intervene specified that this should occur **through the introduction of binding instruments** in the form of a Regulation and an ECP. Among the arguments in favour of binding EU intervention on facilitating cross-border

[236] ICF S.A. Final Report (n 14), p. 124.
[237] ICF S.A. Final Report (n 14), p. 124.
[238] ICF S.A. Final Report (n 14), p. 125.
[239] ICF S.A. Final Report (n 14), p. 126.

recognition of parenthood were that it would safeguard the rights of children and same-sex families and that it would facilitate the free movement of families.'[240] The same Report also explains that the majority of respondents expect the impact of an EU intervention on fundamental rights to be positive, 'in particular in relation to the best interest of the child principle, freedom of movement, and the principle of non-discrimination. One respondent indicated that additional impacts that need to be considered include the impacts on the right to have an identity, the right to have a nationality and to know your family relations (e.g. for medical reasons)'.[241] Regarding the impact of binding EU intervention on social matters, some of the NGO respondents indicated that they anticipate positive impacts, with one suggesting that this would have a positive impact on legal certainty and two pointing to positive impacts on all social matters, in particular: 'integration and social inclusion; impact on emotional/psychological well-being of parents and children; longer-term impacts on children (e.g. poverty, early school leaving, lasting damage for children growing up with absent parents); impacts on social protection and social inclusion.'[242] At the same time, some negative impacts on social matters are expected by some of the respondents, which include 'potential negative psychological, health and emotional consequences, as well as the forced coming out of parents'.[243]

The Commission published its Impact Assessment report as one of the documents accompanying the proposed Regulation.[244] Together with it, the Commission also published an Executive Summary of the report.[245] The Impact Assessment report consists of 9 sections: 1) Introduction: political and legal context; 2) problem definition; 3) why should the EU act?; 4) objectives: what is to be achieved?; 5) what are the available policy options?; 6) what are the impacts of the policy options?; 7) how do the options compare?; 8) preferred option; 9) how will actual impacts be monitored and evaluated? It is also accompanied by 8 Annexes. Prior to its publication (with the proposed Regulation) in December 2022, the draft Impact Assessment report was examined by the Regulatory Scrutiny Board and received a positive opinion on 8 June 2022, as well as a handful of suggestions for possible improvements regarding mostly technical matters, which – together with the responses of the Commission – can be found in a table that was added to the final Impact Assessment report.[246]

The content of the Impact Assessment report will not be summarised here, given that reference to relevant parts of it have already been made in various parts of the study. It is particularly interesting to note, however, that **a large part of the report is devoted to a detailed examination – as regards their expected impacts and their effectiveness, efficiency and coherence with the Union's legal and policy framework – of the different policy options available as a solution to the problem of non-recognition of parenthood and an equally detailed explanation of the reasons that the adoption of a legislative instrument in the form of the proposed Regulation has been chosen as the best policy option**.

All the above consultations, reports, feedback activities, and discussions led the Commission to the following **conclusion**: **that there is, indeed, a problem in the EU with the non-recognition of parenthood in cross-border situations; that this problem has a serious negative impact on**

[240] ICF S.A. Final Report (n 14), p. 137.

[241] ICF S.A. Final Report (n 14), p. 137.

[242] ICF S.A. Final Report (n 14), p. 137.

[243] ICF S.A. Final Report (n 14), p. 137.

[244] Impact Assessment report (n 11).

[245] Commission Staff Working Document 'Executive Summary of the Impact Assessment Report' SWD(2022) 392 final. The full text of this document is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2022%3A392%3AFIN&qid=1670583901517.

[246] Impact Assessment report (n 11), pp. 48-49.

children's welfare and on the enjoyment of their fundamental rights; that there is, therefore, a clear need for action at EU level; and that the form that this action must take is that of a binding legal instrument and, in particular, of a Regulation.

5. THE PROPOSAL

KEY FINDINGS

- The **proposal** was published on **7 December 2022**.
- The Commission has chosen to propose the adoption of a **Regulation** in order to ensure that the same private international rules will be applied in all Member States.
- The proposal **addresses all main questions of private international law** and thus seeks to provide a **complete solution** to the problem of lack of recognition of parenthood in the EU. It makes provision for the following:
    - The adoption of common rules for the determination of the **courts** of the Member States that have **jurisdiction** in matters related to the establishment of parenthood in cross-border situations.
    - The adoption of common rules for the determination of the **law applicable** to the establishment of parenthood in cross-border situations.
    - A **mutual recognition obligation** of parenthood established in a Member State.
    - The creation of a **European Certificate of Parenthood**, which can be issued by the Member State where parenthood was established and can be used to prove parenthood in all other Member States.

The **aim of this chapter** will be to provide a **detailed explanation of the proposal**.

The proposal was published with (almost) a whole month delay from the date originally planned (9 November), **on 7 December 2022**. It was announced in the framework of an Equality package which included also an initiative to strengthen the role and independence of equality bodies.[247]

The **Commission has chosen to propose the adoption of a Regulation**, in that '[t]he adoption of uniform rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations can only be achieved through a Regulation as only a Regulation ensures a fully consistent interpretation and application of the rules.'[248] According to Article 288 TFEU, **Regulations have general application and are binding in their entirety and directly applicable in all Member States**. Hence, (if and) once the proposal will come into force it will automatically be deemed to be part of the law of the Member States, without requiring any transposition and thus without affording any discretion to the latter. **This will ensure that the same private international rules will be applied in all Member States**, which is essential for the effectiveness of the instrument.[249]

As noted in chapter 1 of the study, the **full title** of the proposal is 'Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood'.[250] The proposal makes provision for the following: a) the adoption of common rules for the determination of the **courts** of the Member States that have **jurisdiction** in matters related to the establishment of parenthood in cross-border situations; b) the adoption of common rules for the determination of the **law applicable** to the establishment of parenthood in cross-border situations; c) a **mutual recognition obligation** of

247 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7509.

248 Explanatory Memorandum attached to the proposal (n 2), p. 7.

249 For an analysis of the argument that the adoption of a Regulation rather than a Directive is more appropriate in the field of private international law see N. A. Baarsma (n 126), pp. 119-120.

250 (n 1).

parenthood established in a Member State; and d) the creation of a **European Certificate of Parenthood**, which can be issued by the Member State where parenthood was established and can be used to prove parenthood in all other Member States. Accordingly, **the proposed Regulation addresses all main questions of private international law** (that is, jurisdiction, applicable law, and recognition) **and, thus, seeks to provide a complete solution to the problem of lack of recognition of parenthood**. Thus, and in view of the limits to the EU's competence with regard to substantive family law, **the Commission has chosen the route of harmonisation not of substantive family law** (for which it lacks the competence) **but of private international law**.

Upon its publication, **the proposal was welcomed** by both the European Parliament Intergroup on LGBTI rights and the European Parliament Children's Rights Intergroup.[251] It was also welcomed by LGBTI organisations,[252] and European Parliament parties, such as the Socialists and Democrats party.[253] **More sceptical reactions** to the initiative have also been voiced.[254]

The **proposed Regulation consists of nine Chapters**: (i) subject matter, scope and definitions; (ii) jurisdiction on parenthood matters in cross-border situations; (iii) applicable law to the establishment of parenthood in cross-border situations; (iv) recognition of court decisions and authentic instruments with binding legal effect issued in another Member State; (v) acceptance of authentic instruments with no binding legal effect issued in another Member State; (vi) the European Certificate of Parenthood; (vii) digital communication; (viii) delegated acts; and (ix) general and final provisions. The proposal includes 99 recitals and is preceded by an Explanatory Memorandum.

In the remaining of this chapter, the focus will be on presenting and explaining the *main* provisions of the proposed Regulation. Given their importance, the provisions from Chapter I need to be quoted in full, and, thus all of the provisions of this chapter are quoted (in bold) and are followed by an explanation. Of the remaining provisions of the proposal, only the most significant ones will be analysed.

'Chapter I – Subject matter, scope and definitions

Article 1 – Subject matter

This Regulation lays down common rules on jurisdiction and applicable law for the establishment of parenthood in a Member State in cross-border situations; common rules for the recognition or, as the case may be, acceptance in a Member State of court decisions on parenthood given, and authentic instruments on parenthood drawn up or registered, in another Member State; and creates a European Certificate of Parenthood.'

This provision seeks to explain what the Regulation is about by setting out the subject matter of the proposal. The proposal aims to achieve its objective of facilitating the recognition in a Member State of the parenthood established in another Member State through the adoption of common rules on international jurisdiction and the applicable law for the establishment of parenthood in a Member State in cross-border situations, the cross-border recognition of court decisions and authentic

[251] See Press release: LGBTI and Children's Rights Intergroups welcome much-awaited Equality package (7 December 2022) available at https://lgbti-ep.eu/2022/12/07/press-release-lgbti-and-childrens-rights-intergroups-welcome-much-awaited-equality-package/.

[252] https://www.ilga-europe.org/press-release/lgbti-organisations-welcome-eu-parental-recognition-proposal/.

[253] https://www.socialistsanddemocrats.eu/newsroom/sds-welcome-proposals-protect-rights-rainbow-families .

[254] See, for instance, https://www.fafce.org/press-release-the-dangers-of-a-european-parenthood-certificate/.

instruments establishing parenthood with binding legal effect in a Member State, the acceptance of authentic instruments with no binding legal effect (but with evidentiary effects) in the Member State of origin,[255] and the creation of an optional European Certificate of Parenthood.

The Explanatory Memorandum attached to the proposal, focuses, in particular, on **explaining the rationale behind the inclusion in the subject matter of the proposal of authentic instruments with no binding legal effect** but with evidentiary effects:

> 'Parenthood is typically established by operation of law or by an act of a competent authority, such as a court decision, a decision by an administrative authority or a notarial deed, after which the parenthood is typically registered in the civil or population register of the Member State. However, citizens most often request the recognition of parenthood in another Member State on the basis of an **authentic instrument which does not establish parenthood with binding legal effect but which has evidentiary effects of the parenthood previously established in that Member State by other means** (by operation of law or by an act of a competent authority). Such authentic instruments can be, **for example, an extract from the civil register or a birth or parenthood certificate**. The uniform rules in the proposal on the law applicable to the establishment of parenthood in cross-border situations are intended to **facilitate the acceptance of authentic instruments with no binding legal effect but with evidentiary effects in the Member State of origin of either the parenthood previously established in that Member State (for example, a birth certificate) or of facts other than the establishment of parenthood (for example, an acknowledgement of paternity or the giving of consent to the establishment of parenthood)**.'[256]

'Article 2 – Relationship with other provisions of Union law

1. This Regulation shall not affect the rights that a child derives from Union law, in particular the rights that a child enjoys under Union law on free movement, including Directive 2004/38/EC. In particular, this Regulation shall not affect the limitations relating to the use of public policy as a justification to refuse the recognition of parenthood where, under Union law on free movement, Member States are obliged to recognise a document establishing a parent-child relationship issued by the authorities of another Member State for the purposes of rights derived from Union law.

2. This Regulation shall not affect Regulation (EU) 2016/1191, in particular as regards public documents, as defined in that Regulation, on birth, parenthood and adoption.'

It should be recalled from the analysis in chapter 3 of the study that in the *V.M.A.* case[257] it was established that Member States are obliged by the EU free movement provisions and the relevant secondary legislation (namely, Directive 2004/38[258]) to recognise (the contents of) a document establishing or evidencing parenthood drawn up in another Member State for the purpose of enabling Union citizens (whether these are the children or the parents) to exercise the rights they derive from EU law. **Article 2(1) of the proposed Regulation demonstrates that this instrument does not**

[255] An explanation of what these documents consist of is provided subsequently in this chapter of the study.

[256] Explanatory Memorandum attached to the proposal (n 2), p. 11.

[257] Case C-490/20 (n 16).

[258] (n 68).

intend to take away these rights that have been recognised through the Court's case-law.[259] Rather, **it shall complement them by requiring the cross-border recognition of the parent-child relationship** – as established in another Member State – *for purposes other than those relating to the rights derived from Union law*, that is, **for rights they derived from the status of parenthood under national law**. Hence, the proposed Regulation shall complement the existing case-law on the cross-border recognition of parenthood, by expanding the material scope of application of the requirement of cross-border recognition to situations that do not concern the exercise or enjoyment of rights deriving from Union law.

Article 2(1) of the proposal also points out that **the proposed Regulation shall not affect the limitations relating to the use of public policy as a justification** for refusing the recognition of parenthood in situations where Member States are required by EU law to recognise parenthood validly established in the territory of another EU Member State. It is well-established that as a derogation from one of the fundamental rights stemming from EU law – the right to free movement – the **public policy exception must be interpreted narrowly**. As noted in Article 27(2) of Directive 2004/38, measures taken on grounds of public policy (or public security) in derogation from the free movement rights bestowed on Union citizens, shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. In addition, as the Court established in the recent ***V.M.A.* case, 'the respect of a Member State's national identity under Article 4(2) TEU and a Member State's public policy cannot serve as justification to refuse to recognise a parent-child relationship between children and their same-sex parents for the purposes of exercising the rights that the child derives from Union law'**.[260] Such a refusal is not consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights, most fundamentally, the right to respect for private and family life and the rights of the child, in particular the right to have the child's best interests taken into account as a primary consideration in all actions relating to children, and the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents.[261] Accordingly, Article 2(1) of the proposal demonstrates that the limitations that have traditionally been attached to the public policy exception in the context of EU free movement law will, also, be applicable in situations when the exception is relied on by Member States for the purpose of derogating from their obligations under the proposed Regulation.

In the Explanatory Memorandum the Commission also explains the following, demonstrating – again – that the proposed Regulation does not in any way amend the obligation of recognition of parenthood imposed on Member States through the *V.M.A.* judgment:

> 'for the purposes of the exercise of rights derived from Union law, **proof of parenthood can be presented by any means**. A Member State is not therefore entitled to require a person to present either the attestation provided for in the proposal accompanying a court decision or an authentic instrument on parenthood, or the European Certificate of Parenthood created by the proposal, **where the person seeks the recognition of parenthood for the purposes of the rights that a child derives from Union law on free movement'**.[262]

Article 2(2) of the proposed Regulation clarifies that the instrument shall not affect Regulation 2016/1191,[263] 'in particular as regards the presentation by citizens of certified copies and the use by

[259] This is, also, clear, from recitals 13 and 14 of the proposed Regulation.

[260] Explanatory Memorandum to the proposal (n 2), p. 11. See, also, recital 14 of the proposed Regulation.

[261] Case C-490/20 *V.M.A.* (n 16), paras 58-59.

[262] Explanatory Memorandum attached to the proposal (n 2), pp. 11-12. See, also, recital 14 of the proposal.

[263] (n 49).

Member State authorities of the Internal Market Information System ('IMI') if they have a reasonable doubt as to the authenticity of a public document on birth, parenthood or adoption or their certified copy presented to them'.[264]

'Article 3 – Scope

1. This Regulation shall apply to civil matters of parenthood in cross-border situations.

2. This Regulation shall not apply to:

(a) the existence, validity or recognition of a marriage or of a relationship deemed by the law applicable to such relationship to have comparable effects, such as a registered partnership;

(b) parental responsibility matters;

(c) the legal capacity of natural persons;

(d) emancipation;

(e) intercountry adoption;

(f) maintenance obligations;

(g) trusts or succession;

(h) nationality;

(i) the legal requirements for the recording of parenthood in a register of a Member State, and the effects of recording or failing to record parenthood in a register of a Member State.

3. This Regulation shall not apply to the recognition of court decisions establishing parenthood given in a third State, or to the recognition or, as the case may be, acceptance of authentic instruments establishing or proving parenthood drawn up or registered in a third State.'

Article 3 of the proposal delimits the scope of the instrument, by providing a list of matters that are not touched by it.

Article 3(1) takes into account the limited competence that the EU has with regard to substantive family law matters and makes it clear that the proposed Regulation applies only *in cross-border situations*. Hence, recital 25 of the proposed Regulation stresses that the instrument 'should not apply to the establishment of parenthood in a Member State in a domestic situation with no cross-border elements. This Regulation should not therefore include provisions on jurisdiction or applicable law for the establishment of parenthood in domestic cases, such as the parenthood of a child further to a domestic adoption in a Member State'. **However, situations where recognition of parenthood is sought in a Member State after it has been established in another Member State involve, as such, a cross-border element, and, thus, the proposed Regulation applies in them, even if the original establishment of parenthood was conducted in a context that presented points of contact with only one Member State**: 'in order to safeguard children's rights without discrimination in cross-border situations as laid down in the Charter, in application of the principle of mutual trust between Member States as confirmed by the Court of Justice, the provisions of this Regulation on the recognition or, as the case may be, acceptance of court decisions and authentic instruments on parenthood should also

[264] Recital 15 of the proposal.

apply to the recognition of parenthood established in a Member State further to a domestic adoption in that Member State'.[265]

Article 3(2) excludes from the material scope of the proposed Regulation matters that may have a link with the parenthood of a child but are governed by other Union or international instruments or by national law, such as matters concerning parental responsibility, intercountry adoption, maintenance, succession, and the validity or recognition of the marriage or registered partnership of the child's parents.[266]

It is important to note here **one of the most significant limitations of the instrument, which is that – as demonstrated by Article 3(3) of the proposal** – the 'rules on jurisdiction and applicable law apply where parenthood is to be established in a Member State in cross-border situations' and **'does not cover the recognition or, as the case may be acceptance, of court decisions and authentic instruments establishing or proving parenthood drawn up or registered in a third State'**.[267] Accordingly, if parenthood was *established* in a third country (e.g. the USA or Canada), the rules of the proposed Regulation will *not* apply in order to require the Member State in which recognition is sought to afford such recognition. In such cases, recognition or acceptance remains subject to the **national law of each Member State**. Hence, in a situation where, for instance, a French couple became parents, through a surrogacy arrangement, to a child born in the USA whose birth certificate, issued by the USA authorities, evidences the filiation between the child and the (intended) parents (as established by a USA court order), the proposed Regulation will not apply in order to require the French authorities to accept the USA birth certificate. The acceptance of the birth certificate and its contents, in such a situation, will be subject to French law (and – as seen in chapter 3 of the study – the requirements imposed by the ECtHR in its case-law).

Having highlighted the territorial limits to the scope of application of the proposal, **it should be emphasised that the proposed Regulation applies to the recognition of the parenthood *of all children, regardless of their nationality and the nationality of their parents*, provided their parenthood has been established in a Member State.** This is made clear by recital 24 of the instrument, which notes that the 'Regulation should apply regardless of the nationality of the child whose parenthood is to be established, and regardless of the nationality of the parents of the child'. Hence, for instance, the situation of a Russian child born to Russian parents in the Netherlands where the parent-child relationship was legally established, will fall within the scope of application of the proposed Regulation and, thus, other Member States will have to recognise the child's filiation as established in the Netherlands.

'Article 4 – Definitions

For the purposes of this Regulation, the following definitions apply:

1. **'parenthood' means the parent-child relationship established in law. It includes the legal status of being the child of a particular parent or parents;**
2. **'child' means a person of any age whose parenthood is to be established, recognised or proved;**

[265] Recital 25 of the proposal.

[266] Explanatory Memorandum attached to the proposal (n 2), p. 12.

[267] Explanatory Memorandum attached to the proposal (n 2).

3. 'establishment of parenthood' means the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting a parenthood established previously;

4. 'court' means an authority in a Member State that exercises judicial functions in matters of parenthood;

5. 'court decision' means a decision of a court of a Member State, including a decree, order or judgment, concerning matters of parenthood;

6. 'authentic instrument' means a document that has been formally drawn up or registered as an authentic instrument in any Member State in matters of parenthood and the authenticity of which:

(a) relates to the signature and the content of the instrument; and

(b) has been established by a public authority or other authority empowered for that purpose by the Member State of origin;

7. 'Member State of origin' means the Member State in which the court decision on parenthood has been given, the authentic instrument on parenthood has been formally drawn up or registered, or the European Certificate of Parenthood has been issued;

8. 'decentralised IT system' means an IT system as defined in point (4) of Article 2 of [the Digitalisation Regulation];

9. 'European electronic access point' means an interoperable access point as defined in point (5) of Article 2 of [the Digitalisation Regulation].'

The Explanatory Memorandum accompanying the proposed Regulation provides useful clarifications relating to the most important of the above definitions (that is, definitions 1, 2, 3 and 6) and will, thus, be quoted here in full:[268]

> '- **Child is defined broadly and includes a person of any age whose parenthood is to be established, recognised or proved**. As the parenthood status is relevant throughout a person's life, the proposal applies to **children of any age**, that is, both minors and adults. However, the best interests of the child and the right to be heard must be understood as referring to the child as defined in the UN Convention on the Rights of the Child, that is, as a person under the age of 18 years, unless the age of majority is attained earlier under the law applicable to the child.
>
> - **Parenthood, also referred to as filiation, means the parent-child relationship established in law, including the legal status of being the child of a particular parent or parents**. For the purposes of the proposal, **parenthood may be biological, genetic, by adoption or by operation of law**. As noted, the proposal covers the parenthood established in a Member State of both minors and adults, including a deceased child and a child not yet born, **whether to a single parent, a de facto couple, a married couple or a couple in a registered partnership**. It covers the recognition of the parenthood of a child **irrespective of how the child was conceived or born** – thus including children conceived with assisted reproductive technology – and **irrespective of the child's type of family** – thus including children with two same-sex

[268] Explanatory Memorandum attached to the proposal (n 2), pp. 12-13.

parents, children with one single parent, and children adopted domestically in a Member State by one or two parents.

- **Establishment of parenthood means the determination in law of the relationship between a child and each parent**, including the establishment of parenthood following a claim contesting a parenthood already established. Where relevant, this term may also include the extinction or termination of parenthood. The proposal **does not apply to the establishment of parenthood in domestic situations with no cross-border elements**, such as a domestic adoption in a Member State, **although it does apply to the recognition of the parenthood established in such domestic situations** in a Member State.[269]

- **Authentic instruments are defined broadly**, as in other Union regulations on civil justice. Authentic instruments under the proposal thus include (i) **documents establishing parenthood with binding legal effect**, such as notarial deeds (for example, in adoption or where the child is not yet born), or administrative decisions (for example, after an acknowledgement of paternity), as well as (ii) **documents which do not establish parenthood with binding legal effect but which provide evidence of the parenthood established by other means** (for example, an extract from a population or civil status register, a birth certificate or a parenthood certificate) **or evidence of other facts** (for example, a notarial act or an administrative document recording an acknowledgement of paternity or the giving of consent to the use of assisted reproductive technology).'

'Article 5 – Competence in matters of parenthood within the Member States

This Regulation shall not affect the competence of the authorities of the Member States to deal with parenthood matters.'

This provision makes it clear that **the proposal does not take away from the Member States the power to determine which authorities within their territory are competent to deal with parenthood matters and which procedures must be followed**. Hence, although the proposed Regulation shall – if it becomes binding – harmonise the choice of law rules and jurisdiction rules of Member States regarding parenthood in cross-border situations, it will not unify, also, the administrative procedures that must be followed in Member States with regard to the establishment and recognition of parenthood in cross-border situations.[270]

'Chapter II – Jurisdiction'

In **Chapter II**, the proposed Regulation lays down **uniform jurisdiction rules on the establishment of parenthood with a cross-border element**.

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[269] This means that although the Regulation does not apply *with regard to the establishment of parenthood* in purely domestic situations (i.e. situations where there are no points of contact with more than one Member State, such as where a child was born in the Member State of nationality of its parents where the family habitually resides and where they seek to establish the parenthood of the child), it does apply where a family requests *the recognition* of that parenthood *in another Member State*. In this latter situation where what is sought is *recognition by Member State B of parenthood established in Member State A*, there is clearly a cross-border element which brings the situation within the scope of application of the Regulation.

[270] See recital 37 of the proposed Regulation.

In the Explanatory Memorandum attached to the proposed Regulation, it is explained that '[i]n order to facilitate the recognition or, as the case may be, acceptance of court decisions and authentic instruments on parenthood, **the proposal lays down uniform jurisdiction rules on the establishment of parenthood with a cross border element**. The rules on jurisdiction also avoid parallel proceedings in different Member States with possible conflicting decisions'.[271]

Hence, **Article 6 lays down the rules of general jurisdiction** and notes that in matters relating to parenthood, jurisdiction shall lie with the courts of the Member State:

(a) of the habitual residence of the child at the time the court is seised, or

(b) of the nationality of the child at the time the court is seised, or

(c) of the habitual residence of the respondent at the time the court is seised, or

(d) of the habitual residence of either parent at the time the court is seised, or

(e) of the nationality of either parent at the time the court is seised, or

(f) of birth of the child.

These are **alternative grounds of jurisdiction seeking to ensure that children can access a court that is in their vicinity**.[272] As noted in the Explanatory Memorandum accompanying the proposed Regulation,[273] '[i]n line with the existing case law of the Court of Justice on the matter, habitual residence is established on the basis of all the circumstances specific to each individual case'.[274]

Article 7 of the proposed Regulation provides that **'[w]here jurisdiction cannot be established based on one of the general alternative jurisdiction grounds noted in Article 6, the courts of the Member State where the child is present shall have jurisdiction'**. As noted in the Explanatory Memorandum attached to the proposal, '[t]his jurisdiction ground may in particular apply to refugee children and children internationally displaced'.[275]

The subsequent provision – **Article 8** – states that **where no court of a Member State has jurisdiction under the proposed Regulation, residual jurisdiction should be determined, in each Member State, by the laws of that Member State**.

Article 9, then, provides for a *forum necessitatis*, which allows a court of a Member State with which a case has a sufficient connection to rule on a parenthood matter that is closely connected with a third State. As explained in the Explanatory Memorandum attached to the proposal, '[t]his can be done on an exceptional basis, such as where proceedings prove impossible in that third State, for

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[271] Explanatory Memorandum attached to the proposal (n 2), p. 13.

[272] Explanatory Memorandum attached to the proposal (n 2), p. 14. See, also, recital 39 of the proposed Regulation.

[273] Explanatory Memorandum attached to the proposal (n 2), p. 14.

[274] For such case-law interpreting the notion with respect to children see, inter alia, Case C-523/07, *A* ECLI:EU:C:2009:225 (https://curia.europa.eu/juris/document/document.jsf?text=&docid=73639&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=738233); Case C-376/14, *C v. M* ECLI:EU:C:2014:2268 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CP0376&qid=1679051548293); and Case C-497/10, PPU *Mercredi v. Chaffe* ECLI:EU:C:2010:829 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0497&qid=1679051576008).
See, also, recital 40 of the proposed Regulation for a more detailed explanation of the factors that are taken into account when determining a child's habitual residence. For an analysis of how the CJEU has interpreted the concept of habitual residence in the context of the EU private international law instruments in the context of family law see T. Kruger, 'Habitual Residence: The Factors that Courts Consider' in P. Beaumont, M. Danov, K. Trimmings and B. Yüksel (eds), *Cross-Border Litigation in Europe* (Hart, 2017).

[275] Explanatory Memorandum attached to the proposal (n 2), p. 14. See, also, recital 42 of the proposed Regulation.

example because of civil war, or where the child or another interested party cannot reasonably be expected to bring proceedings in that third State'.[276]

Articles 10 to 14 of the proposal focus on more specific matters, such as which court has jurisdiction for the determination of incidental questions raised during parenthood proceedings (Article 10), and when a court shall be deemed to be seised (Article 11). Article 14 (*lis pendens*) tackles the risk of parallel proceedings involving the same cause of action and between the same parties before various courts: it is provided that any court other than the court first seised shall stay its proceedings until such time as the jurisdiction of the court first seised is established.

Article 15 aims to safeguard the right of children below the age of 18 years who are capable of forming their views to be provided with an opportunity to express these views in proceedings on parenthood that concern them. Children must have a 'genuine and effective opportunity to express their views, either directly or through a representative or an appropriate body', and the court 'shall give due weight to the views of the children in accordance with their age and maturity'.

'Chapter III – Applicable law'

Chapter III of the proposed Regulation lays down the rules that should determine the applicable law regarding the establishment of parenthood in situations which have points of contact with more than one State.

The first provision of the chapter – **Article 16** – states: '**Any law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State'**. Hence, as explained in the Explanatory Memorandum attached to the proposal,[277] '[t]he law designated as applicable by the proposal has a universal character'.

Article 17 provides that, as a general rule, **the law applicable to the establishment of parenthood should be the law of the State of the habitual residence of the person giving birth at the time of birth**. Hence, Article 17(1) of the proposed Regulation provides:

> 'The law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the person giving birth at the time of birth or, where the habitual residence of the person giving birth at the time of birth cannot be determined, the law of the State of birth of the child.'

However, the Explanatory Memorandum attached to the proposal explains that, '[i]n order to address the most frequent problems with the recognition of parenthood occurring today, by way of **exception** to the above-mentioned rule, **where that rule results in the establishment of parenthood as regards only one parent** (typically the genetic parent in a same-sex couple), **the authorities of a Member State with jurisdiction on matters of parenthood under the proposal may apply one of two subsidiary alternative rules**'.[278]

Hence, **Article 17(2)** of the proposed Regulation provides: 'Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards only one parent, **the law of the State of nationality of that parent or of the second parent**, **or the law of the**

[276] Explanatory Memorandum attached to the proposal (n 2), p. 14.
[277] Explanatory Memorandum attached to the proposal (n 2), p. 14.
[278] Explanatory Memorandum attached to the proposal (n 2), p. 14.

State of birth of the child, may apply to the establishment of parenthood as regards the second parent.'

An **example** can serve **to explain how the two paragraphs of Article 17 work in practice**. Imagine a same-sex couple (comprised of two women - both Polish nationals) who habitually reside in Spain, where one of the two women gives birth to a child. According to **Article 17(1)**, the law applicable to the establishment of parenthood shall be Spanish law as Spain is the State of the habitual residence of the person giving birth at the time of birth; since Spain allows two persons of the same-sex to be the joint legal parents of a child, the parent-child relationship between the child and both of her mothers will be established under Spanish law and will be evidenced through a birth certificate. Let's change the scenario, however, in order to demonstrate a situation where **Article 17(2)** will apply instead. Imagine we have a same-sex couple comprised of two women (both Spanish nationals) who habitually reside in Bulgaria where one of the two women gives birth to a child. According to Article 17(1), it is the Bulgarian law that would apply for the establishment of parenthood in this situation. However, Bulgarian law does not allow two persons of the same sex to be recognised as the joint legal parents of a child and, thus, its application would result in the child being able to establish filiation with only one of the parents (i.e. the birth mother). It is, exactly, in order to remedy this problem that Article 17(2) was inserted: since the applicable law (the Bulgarian) would result in the establishment of parenthood as regards only one parent, the law of the State of nationality of that parent should apply to the establishment of parenthood as regards that parent – this would mean that Spanish law would apply and, thus, the fact that the two parents of the child are a same-sex couple would not prevent the establishment of parenthood as regards the second parent.

Recital 52 of the proposed Regulation also clarifies what happens in situations where **parenthood has been established through the application of Article 17(2) and the family wishes to have it recognised in another Member State** relying on the proposed Regulation:

> 'Given that, in those cases, both the parenthood as regards one parent and the parenthood as regards the other parent would be established in accordance with one of the laws designated as applicable by this Regulation, **the parenthood as regards each parent**, **including where established by the authorities of different Member States**, **should be recognised in all other Member States under the rules of this Regulation** where the parenthood as regards each parent has been established by the authorities of a Member State whose courts have jurisdiction under this Regulation'.

Moreover, the Commission has explained that '[w]here a court decision or an authentic instrument establishing parenthood with binding legal effect as regards each of the parents in accordance with one of the applicable laws designated by the proposal has been given, drawn up or registered by a court or another competent authority of a Member State with jurisdiction under the proposal, **each of such documents establishing parenthood as regards each of the parents should be recognised in all other Member States in accordance with the rules on recognition laid down in the proposal**'.[279] It further clarified that the rule in Article 17(2) 'may be used by authorities with jurisdiction that consider the establishment of parenthood first in time but also by authorities with jurisdiction in a situation where the authorities of another Member State have already established parenthood as regards only one parent'.[280]

[279] Explanatory Memorandum attached to the proposal (n 2), p. 15.

[280] Explanatory Memorandum attached to the proposal (n 2), p. 15.

An exception to the rules provided in Article 17 is laid down in **Article 22**, which introduces a **public policy** (*ordre public*) **exception**. It notes:

> '1. The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the **public policy (*ordre public*)** of the forum.
>
> 2. Paragraph 1 shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the **Charter**, in particular **Article 21** thereof on the **right to non-discrimination**.'

Recital 56 of the proposed Regulation provides further **clarification regarding the application of the public service exception**:

> 'Considerations of public interest should allow courts and other competent authorities establishing parenthood in the Member States to disregard, in **exceptional circumstances**, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. **However, the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State when doing so would be contrary to the Charter and, in particular, Article 21 thereof, which prohibits discrimination**.'

In its Explanatory Memorandum attached to the proposal, the Commission repeated the above points and added the further clarification that '[t]his **exception should not therefore apply to refuse the application of a provision of another State providing for the possibility of parenthood as regards two parents in a same-sex couple merely on the grounds that the parents are of the same sex'**.[281]

Articles 18 to 21 of the proposal deal with **procedural issues and other details** (such as what matters will be governed by the applicable law and what happens when there is a subsequent change of the applicable law), and **Article 23** provides that **where the law specified by this Regulation as the applicable law is that of a State that comprises several territorial units, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply** and, in the absence of such internal conflict-of-laws rules, the Article in its second paragraph makes provision for the rules that can apply.

'Chapter IV – Recognition'

Chapter IV of the proposed Regulation is the longest part of the instrument and lays down the rules that should determine the recognition of court decisions (Sections 1 and 2) and authentic instruments establishing parenthood with binding legal effect issued in another Member State[282] (Section 4).

The proposed Regulation adopts, essentially, the same rule of mutual recognition for court decisions and authentic instruments establishing parenthood with binding legal effect. This is exemplified by Recital 65 of the proposal, which states: '[a]uthentic instruments with binding legal

[281] Explanatory Memorandum attached to the proposal (n 2), p. 15.

[282] As noted in recital 59 of the proposed Regulation, '[d]epending on the national law, an authentic instrument establishing parenthood with binding legal effect in the Member State of origin can be, for example, a notarial deed of adoption or an administrative decision establishing parenthood following an acknowledgement of paternity'.

effect in the Member State of origin should be treated as equivalent to "court decisions" for the purposes of the rules on recognition of this Regulation'**.**

As explained in the Explanatory Memorandum attached to the proposed Regulation, '[t]he recognition in a Member State of court decisions given in another Member State, and of authentic instruments establishing parenthood with binding legal effect in the Member State of origin, should be based on the principle of mutual trust in one another's justice system. […] Court decisions and authentic instruments establishing parenthood with binding legal effect issued in a Member State should be recognised in another Member State without any special procedure being required, including to update the civil status records of the child'.[283] This is reflected in Article 24(1) of the proposed Regulation, which provides that '**A court decision on parenthood given in a Member State shall be recognised in all other Member States without any special procedure being required**', and in Article 36 of the instrument, which states that '**Authentic instruments establishing parenthood with binding legal effect in the Member State of origin shall be recognised in other Member States without any special procedure being required**'.

Article 26 (for court decisions) and Articles 36 and 37 (authentic instruments) provide that a party who wishes to invoke a court decision or an authentic instrument establishing parenthood with binding legal effect in another Member State should produce a copy of the court decision or authentic instrument and the relevant attestation. As explained in the Explanatory Memorandum attached to the proposal, 'Attestations are aimed to facilitate the readability of the documents that they accompany and thus their recognition. As regards authentic instruments establishing parenthood with binding legal effect, the attestation also serves to prove that the Member State whose authority issued the authentic instrument had jurisdiction to establish parenthood under the proposal'.[284]

Article 31(1) of the proposal contains an exhaustive list of the grounds on which a Member State may refuse to recognise a court decision. These are:

> '(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the child's interests;
>
> (b) where it was given in default of appearance if the persons in default were not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable those persons to arrange for their defence unless it is determined that such persons have accepted the court decisions unequivocally;
>
> (c) upon application by any person claiming that the court decision infringes his fatherhood or her motherhood over the child if it was given without such person having been given an opportunity to be heard;
>
> (d) if and to the extent that it is irreconcilable with a later court decision relating to parenthood given in the Member State in which recognition is invoked;
>
> (e) if and to the extent that it is irreconcilable with a later court decision relating to parenthood given in another Member State provided that the later court decision fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked.'

[283] Explanatory Memorandum attached to the proposal (n 2), p. 15.

[284] Explanatory Memorandum attached to the proposal (n 2), p. 15.

With regard to the exhaustive list of grounds for refusal of recognition of an authentic instrument establishing parenthood with binding legal effect, this is provided in Article 39(1) of the proposed Regulation:

> '(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the child's interests;
>
> (b) upon application by any person claiming that the authentic instrument infringes his fatherhood or her motherhood over the child, if the authentic instrument was formally drawn up or registered without that person having been involved;
>
> (c) if and to the extent that it is irreconcilable with a later court decision relating to parenthood given, or a later authentic instrument establishing parenthood with binding legal effect drawn up or registered, in the Member State in which recognition is invoked;
>
> (d) if and to the extent that it is irreconcilable with a later court decision relating to parenthood given, or a later authentic instrument establishing parenthood with binding legal effect drawn up or registered, in another Member State provided that the later court decision or authentic instrument fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked.'

Article 31(2) explains that the public policy derogation shall be applied 'in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination'. **Article 31(3) underlines the importance of children's views to be heard** and notes that '[t]he recognition of a court decision in matters of parenthood may be refused if it was given without children having been given an opportunity to express their views, unless this is against the interest of the child. Where children were below the age of 18 years, this provision shall apply where the children were capable of forming their views in accordance with Article 15'. **The second and third paragraphs of Article 39 repeat – almost word-for-word – the same requirements, but for authentic instruments with binding legal effect.** Recital 64 of the proposed Regulation explains that '[a]s regards the opportunity given to children below the age of 18 years to express their views, it should be for the court of origin to decide about the appropriate method for hearing the child. Therefore, it should not be possible to refuse recognition of a court decision on the sole ground that the court of origin used a different method to hear the child than a court in the Member State of recognition would use'.

With regard, in particular, to the refusal of recognition of parenthood based on the ground of public policy, the Commission has provided detailed guidance in its Explanatory Memorandum attached to the proposal:[285]

> '**The ground for the refusal of recognition based on public policy (*ordre public*) is to be used exceptionally and in the light of the circumstances of each particular case**, that is, not in an abstract manner to set aside the recognition of the parenthood of a child where, for example, same-sex parents are involved. **In a given case, such recognition would have to be manifestly incompatible with the public policy of the Member State where recognition is sought** because, for example, the fundamental rights of a person have been infringed in the conception, birth or adoption of the child or in the establishment of the parenthood of the child. **The courts or other competent authorities should not be able to refuse to recognise a court decision or an authentic instrument issued in another Member State where doing so would be**

[285] Explanatory Memorandum attached to the proposal (n 2), p. 16.

contrary to the Charter and, in particular, Article 21 thereof, which prohibits discrimination, including of children. Member State authorities could not thus refuse on public policy grounds the recognition of a court decision or an authentic instrument establishing parenthood through adoption by a single man, or establishing parenthood as regards two parents in a same-sex couple merelsy on the ground that the parents are of the same sex. **The proposal will not affect the limitations imposed by the case law of the Court of Justice on the use of public policy** to refuse the recognition of parenthood where, under Union law on free movement, Member States are obliged to recognise a document establishing a parent-child relationship issued by the authorities of another Member State for the purposes of the exercise of rights derived from Union law. In particular, the recognition of a parent-child relationship for the purposes of the exercise of the rights that the child derives from Union law **cannot be refused by invoking public policy on the ground that the parents are of the same sex**.'

'Chapter V – Authentic instruments with no binding legal effect'

According to Article 44 of the proposal, **Chapter V 'shall apply to authentic instruments which have no binding legal effect in the Member State of origin but which have evidentiary effects in that Member State**'. The Commission's Explanatory Memorandum attached to the proposal explains that '[d]epending on the national law, such an authentic instrument can be, for example, a birth certificate, a parenthood certificate, an extract on birth from the register, or a notarial or administrative document recording an acknowledgement of paternity or the consent of a mother or of a child to the establishment of parenthood'.[286]

Article 45 – which is the only other provision in this chapter – **lays down the rules regarding the cross-border recognition of authentic instruments with no binding legal effect**. The full text of the provision is quoted here:

'1. An authentic instrument which has no binding legal effect in the Member State of origin **shall have the same evidentiary effects** in another Member State as it has in the Member State of origin, **or the most comparable effects**, **provided that it is not manifestly contrary to public policy** (*ordre public*) in the Member State where it is presented.

2. The **public policy** (*ordre public*) referred to in paragraph 1 **shall be applied by the courts and the other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter**, in particular Article 21 thereof on the right to non-discrimination.

3. A person wishing to use such an authentic instrument in another Member State **may ask the authority that has formally drawn up or registered the authentic instrument in the Member State of origin to fill in the form in Annex III describing the evidentiary effects** which the authentic instrument produces in the Member States of origin.

4. The attestation shall contain a statement informing Union citizens and their family members that the attestation does not affect the rights that a child derives from Union law and that, for the exercise of such rights, proof of the parent-child relationship can be presented by any means.

[286] Explanatory Memorandum attached to the proposal (n 2), p. 16.

5. **Any challenge relating to the authenticity of such an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that Member State**. The authentic instrument challenged shall not produce any evidentiary effect in another Member State as long as the challenge is pending before the competent court.

6. Any challenge relating to the legal acts or legal relationships recorded in such an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged as long as the challenge is pending before the competent court.

7. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in such an authentic instrument, that court shall have jurisdiction over that question.'

'Chapter VI – European Certificate of Parenthood'

One of the most important elements of the proposal is the **introduction of an optional**[287] **– binding – European Certificate of Parenthood**, modelled on the European Certificate of Succession introduced by Regulation 650/2012.[288] The **rationale** behind the introduction of the Certificate is explained in recital 76 of the proposal: '**In order for the recognition of the parenthood established in a Member State to be settled speedily, smoothly and efficiently**, children or their parent(s) **should be able to demonstrate easily the children's status** in another Member State. To enable them to do so, this Regulation should provide for the creation of a uniform certificate, the European Certificate of Parenthood, to be issued for use in another Member State'.

As noted in Article 46(3) of the proposal, **in order to respect the principle of subsidiarity**, the **Certificate is optional and 'shall not take the place of internal documents used for similar purposes in the Member States'**. Hence, upon the coming into force of the proposed Regulation, children will continue to receive national documents that establish or evidence parenthood, however, *if they wish*, they – or their legal representative – will be able to apply for the Certificate. **Once issued, the Certificate 'shall produce its effects in all Member States without any special procedure being required'**,[289] and can be used also in the Member State where it was issued.[290] The Certificate 'shall constitute a valid document for the recording of parenthood in the relevant register of a Member State',[291] and 'shall be presumed to demonstrate accurately elements which have been established under the law applicable to the establishment of parenthood. The person mentioned in the Certificate as the child of a particular parent or parents shall be presumed to have the status mentioned in the Certificate'.[292] **The Certificate – therefore – does not seek to interfere in any way with the**

[287] Article 46(2) of the proposal.

[288] (n 138). For an analysis of the provisions of Regulation 650/2012 concerning the European Certificate of Succession see U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde, F. Odersky, and B. Reinhartz, *EU Regulation on Succession and Wills: Commentary* (Otto Schmidt, 2015), pp. 245-298.

[289] Article 53(1) of the proposal.

[290] Explanatory Memorandum attached to the proposal (n 2), p. 17.

[291] Article 53(3) of the proposal.

[292] Article 53(2) of the proposal.

substantive family law of the Member States: its aim is simply to complement the current (national) documents that are issued by Member States and which establish or evidence parenthood and to offer an *additional* way for children and their legal representatives to prove parenthood and to invoke this status throughout the EU.

This is, after all, obvious from Article 48 of the proposal, which provides that **the Certificate shall be issued in the Member State in which parenthood was established and whose courts have jurisdiction under the proposed Regulation**. The same provision notes that **the issuing authority shall be a court or another authority which, under national law, has competence to deal with parenthood matters**. Accordingly, and respecting the limits to the EU's competence in the substantive family law field, the proposed Regulation does not lay down any *EU* rules which will govern the establishment of parenthood in situations where the Certificate is applied for: rather, in order to determine the parenthood of the child in respect of whom the Certificate will be issued, the rules of the Member State that – according to the proposed instrument – are applicable to establish parenthood, shall apply. Article 47 explains that the Certificate 'is for use by a child or a legal representative who, in another Member State, needs to invoke the child's parenthood status'.

The application procedure is summarised in Articles 49 and 50 of the proposal. Article 49 notes that the Certificate shall be issued upon application by the child or a legal representative, who may use the form in Annex IV. **Article 51 of the proposal then provides that '[t]he issuing authority shall issue the Certificate without delay in accordance with the procedure laid down in this Chapter when the elements to be certified have been established under the law applicable to the establishment of parenthood'**, using the form in Annex V. A Certificate shall not be issued if '(a) the elements to be certified are being challenged; or (b) the Certificate would not be in conformity with a court decision covering the same elements'. The same provision states that a fee can be charged for issuing the Certificate, but this should not be higher than the fee collected for issuing a certificate under national law providing evidence of the parenthood of the applicant.

Article 52 then **lists the information that the Certificate shall contain**, while **Article 53** notes the effects of the Certificate, pointing out – in its first paragraph – that **'[t]he Certificate shall produce its effects in all Member States without any special procedure being required'**. Article 53(2) provides that '[t]he Certificate shall be presumed to demonstrate accurately elements which have been established under the law applicable to the establishment of parenthood. The person mentioned in the Certificate as the child of a particular parent or parents shall be presumed to have the status mentioned in the Certificate', while Article 53(3) notes that the Certificate 'shall constitute a valid document for the recording of parenthood in the relevant register of a Member State'.

Article 54 of the proposal provides that **the issuing authority shall keep the original of the Certificate and shall issue one or more certified copies to the applicant or a legal representative**, keeping a list of persons to whom certified copies have been issued. **Article 55** then lays down the procedures for **rectification, modification or withdrawal of the Certificate**, **Article 56 details the redress procedures, whilst Article 57 explains how the effects of the Certificate may be suspended**.

The importance of the introduction of the Certificate is highlighted by the Commission in its Explanatory Memorandum, where it noted the following:

> 'a Certificate is issued always through the **same procedure as laid down in the proposal**, in a **uniform standard form** (included in Annex V to the proposal), and **with the same contents and effects throughout the Union as laid down in the proposal**. The Certificate is presumed to

demonstrate accurately the elements established under the applicable law designated by the proposal, and **does not need to be transposed into a national document** before it can have access to the relevant register in a Member State. As the Certificate form would be available in all Union languages, **the need for translations would be significantly reduced**'.[293]

Chapter VII of the proposal focuses on digital communication, with Article 58(1) stating that the European electronic access point established on the European e-Justice Portal may be used for electronic communication between natural persons or their legal representatives and Member State courts or other competent authorities in connection with proceedings for a decision that there are no grounds for the refusal of recognition or proceedings for the refusal of recognition, as well as the application for issuance, rectification, modification, withdrawal, suspension or redress procedures of the European Certificate of Parenthood.

Chapter VIII concerns **delegated acts** and Article 63 empowers the Commission to adopt delegated acts in order to update or make technical changes to Annexes I to V, with the details as to how this power can be exercised being laid down in Article 64.

The last Chapter – **Chapter IX** – contains the **general and final provisions**. Among the provisions that are worth mentioning here is Article 65, which notes that **'[n]o legalisation or other similar formality shall be required in the context of this Regulation'**.

The temporal scope of the instrument is laid down in Article 69. Article 69(1) provides, as a **general rule, that the Regulation shall apply to legal proceedings instituted and to authentic instruments formally drawn up or registered on or after its date of application**. However, there are **two exceptions** to this. Article 69(2) provides that '[n]otwithstanding paragraph 1, where the parenthood was established in conformity with one of the laws designated as applicable under Chapter III in a Member State whose courts had jurisdiction under Chapter II, Member States shall recognise: (a) a court decision establishing parenthood in another Member State in legal proceedings instituted prior to [*date of application of this Regulation*], and (b) an authentic instrument establishing parenthood with binding legal effect in the Member State of origin which was formally drawn up or registered prior to [*date of application of this Regulation*]'. Article 69(3) then notes that '[n]otwithstanding paragraph 1, Member States shall accept an authentic instrument which has no binding legal effect in the Member State of origin but which has evidentiary effects in that Member State, provided that this is not manifestly contrary to the public policy (*ordre public*) of the Member State in which acceptance is sought'.

Article 72 of the proposal explains that **the Regulation shall enter into force on the twentieth day following that of its publication in the OJ, however, it shall apply from the first day of the month following a period of 18 months from the date of its entry into force**.

Having **provided an explanation of the main provisions of the proposal in this chapter**, we should now proceed to offer a **critical analysis of the proposal**, by addressing its contributions and advantages as well as the gaps that it leaves and the challenges that may ensue during the process of its approval by the Council.

[293] Explanatory Memorandum attached to the Proposal (n 2).

6. A CRITICAL ASSESSMENT OF THE PROPOSAL: PROSPECTS AND CHALLENGES

KEY FINDINGS

- The proposed Regulation is a **very positive step towards a wholesome EU solution to the problem of non-recognition of parenthood in the EU**, in situations which present a cross-border element.
- The proposed instrument will **enhance legal certainty** and will – as a result – **save time and costs**, both for families whose situation presents a cross-border element but, also, for the judicial and administrative authorities of Member States which are involved in the procedures for establishment and recognition of parenthood. Legal certainty and predictability will be **further enhanced** through the introduction of the **European Certificate of Parenthood**. **The proposed instrument will, therefore, solve many of the problems and difficulties identified in chapter 2 of the study**.
- Due to the fact that **the proposed Regulation is** a **highly technical and complex** document, families that will need to rely on it **will still need to obtain legal advice** regarding its interpretation and application and, thus, although legal costs and time delays will be reduced in many (straightforward) cases, it is unlikely that these will be completely avoided, especially in more complicated factual scenarios.
- Due to the fact that the proposed Regulation will be applied by national courts and authorities, **the rules laid down in the instrument may not always be interpreted and applied in the same manner in all Member States**.
- The proposed Regulation is an **inclusive instrument**, which covers the situation of *every* child whose parenthood has been established in a Member State. It therefore covers, inter alia, the **children of same-sex parents, surrogate-born children, the children of unmarried parents, and the children of families comprised exclusively of third-country nationals, provided that the parenthood of the child was established in a Member State**.
- According to Protocols 21 and 22 attached to the Treaties, **the proposed Regulation will not apply to Denmark**, should it come into force. Moreover, **Ireland** is **not bound** by measures adopted in the area of justice under Title V of Part Three of the TFEU, **unless it exercises its option to 'opt-in'**; at the moment, it is not clear what is the position of Ireland with regard to the proposed Regulation.
- The proposal does not make any provision for ensuring that the right of the child to have **access to its origins** will be safeguarded.
- One of the challenges that will ensue in the application of the proposed Regulation will be to ensure that the **public policy exception** will not be abusively used by Member States to avoid the obligations imposed on them by this instrument for reasons which are not, in reality, based on their public policy.
- One of the most important limits placed on the scope of application of the proposed Regulation is that it applies only in situations where parenthood has been established in a Member State. This leaves a **significant gap in the protection** afforded by the proposed Regulation, which **disproportionately affects surrogate-born children**, in view of the fact that in the majority of instances, it is this group of children who have had **their parenthood established in a third State**.
- The most important challenge that the proposed Regulation will face is the possibility that the requisite **unanimity in the Council** – which is required in order for the measure to be approved and to come into force – will not be attained as a result of one or more Member States voting against the proposal.

6.1. Introduction

This chapter will aim to provide a critical analysis of the proposal. For this purpose, it will, first, examine **whether the proposed Regulation will be able to solve the problems of non-recognition of parenthood** identified in chapter 2 of the study. The chapter will, then, **identify the gaps** in protection that will persist even if the proposed Regulation will enter into force, and will **consider the challenges that the proposal may face**, both whilst it is discussed by EU institutions and – if it is approved unanimously in the Council – after it comes into force. The chapter will, also, seek to make recommendations **for the improvement of the proposal and for responding to the challenges that may ensue in the process of its approval and beyond**.

6.2. The proposed Regulation as a positive step towards the resolution of the problem of non-recognition of parenthood in the EU

The proposed Regulation is, clearly, **a very positive step towards a wholesome – EU – solution to the problem of non-recognition of parenthood in situations that present a cross-border element**. Its introduction should, therefore, clearly be welcomed.

6.2.1. An instrument which will – to a great extent – solve procedural difficulties with recognition and will enhance legal certainty whilst saving time and costs

The proposed instrument **will enhance legal certainty and will – as a result – save time and costs**, both for families whose situations presents a cross-border element and seek to have their parenthood established and/or recognised in another Member State but, also, for the judicial and administrative authorities of Member States involved in the procedures for establishment and recognition of parenthood.

The unification of the private international law rules of the Member States in this area will mean that **the rules regarding the establishment and recognition of parenthood in cross-border situations will**, once the proposal comes into force, **become foreseeable and known in advance**. Accordingly, the current **lack of certainty** as to whether parenthood established in one Member State will be recognised in another, which in itself can constitute an obstacle to the exercise of free movement and other rights stemming from EU law, **will, *to a great extent*, be remedied**.

The words 'to a great extent' in the previous paragraph are italicised, as it needs to be emphasised that like with every legal instrument, complete certainty and foreseeability will not be achieved with the proposed Regulation. The latter is a **highly technical and complex** document that will need to be analysed by legal experts and practitioners. What is more, it will not always be possible for legal experts and practitioners to predict the outcome of a case from a simple perusal of the document. This will be even more so for lay persons. Accordingly, families that will need to apply for cross-border recognition of parenthood will, in most instances, **still need to obtain legal advice** regarding the interpretation and application of this instrument and, thus, **although legal costs and time delays will be reduced in many (straightforward) cases, it is unlikely that these will be completely avoided, especially in more complicated factual scenarios**.

In addition, given that the proposed Regulation will be applied by national courts and national authorities, **the rules laid down in the instrument may not always be interpreted and applied in the same manner in all Member States**.[294] As explained in academic literature, one of the reasons that

[294] For examples of instances where there have been different interpretations and applications of the same EU private international law rules in different Member States see K. Trimmings and B. Yüksel, 'Non-uniform Application of European

have led to the non-uniform application of the EU private international rules in the Member States is 'insufficient knowledge of and training in the specific EU private international law instruments on the part of the relevant actors, in particular judges and legal practitioners'. [295]

Accordingly, and **in order to improve the clarity of the instrument and the predictability of the outcome of cases and scenarios where it will apply, it is recommended that (if and) once the proposed Regulation comes into force,** the **Commission should issue guidelines** on its application and enforcement **(Recommendation 1)** and **national judges, civil servants, and legal practitioners should receive training in order to be able to interpret and apply the Regulation uniformly (Recommendation 2)**.[296]

Moreover, it is strongly recommended that **whenever there is a doubt as regards the interpretation of a provision of the proposed Regulation, national judges should use the preliminary ruling mechanism in order to obtain an authoritative interpretation from the CJEU which will be uniformly applicable in all Member States (Recommendation 3)**.

In any event, **the fact that there will be clear binding rules** regarding the jurisdiction of courts, the applicable law, as well as the recognition of decisions and the acceptance of authentic instruments in matters of parenthood, **will certainly enhance clarity in situations involving the establishment and recognition of parenthood in a cross-border context and will solve many of the (procedural) difficulties identified in chapter 2 of the study.**

Hence, the **problems encountered in situations such as those at issue in Petition 0911/2020**,[297] **where the refusal of recognition of parenthood established in another Member State was based on a purely procedural ground** (the need to be able to check the data with regard to parenthood with the (deceased) father of the (now adult) child)**, will be resolved once the proposed Regulation will come into force,** given that the instrument allows the refusal of recognition *only* if it is based on one of the grounds noted in the *exhaustive lists* laid down in Articles 31 and 39.

Similarly, **the fact that the proposed Regulation will introduce common rules regarding the determination of the applicable law for establishing parenthood coupled with the introduction of the requirement of mutual recognition of parenthood established in a Member State,** means that **it will no longer be possible that the same child will have different legal parents in different Member States**. Hence, problems of non-recognition such as those mentioned in two of the examples noted in chapter 2 (p. 27) of the study and which emerge as a result of different legal presumptions of paternity in different Member States, will not arise following the coming into force of this instrument.

What is more, **the Commission in its proposal has adopted a wide interpretation for the term 'establishment of parenthood'** noting – in recital 33 of the instrument – that it 'should mean the legal determination of the legal relationship between a child and each parent, and should be understood to include […] *the extinction or termination of parenthood*'.[298] **This will, obviously, resolve problems of**

Union Private International Law' in V. Ruiz Abou-Nigm and M. Blanca Noodt Taquela (eds), *Diversity and Integration in Private International Law* (Edinburgh University Press, 2019).

295 K. Trimmings and B. Yüksel (n 294), p. 89.

296 As noted by another academic commentator, '[f]acilitating freedom of movement is not, however, limited to the passing of laws or the issuing of guidelines; it requires that the institutions and Member States go further and make available the resources necessary to ensure that there is a coordinated and integrated approach to the handling of European family law cases' – P. McEleavy, 'Free Movement of Persons and Cross-Border Relationships' (2005) 7 International Law FORUM du droit international 153, p. 158.

297 (n 48).

298 Emphasis added.

non-recognition of documents or court rulings which evidence the termination of parenthood, such as those encountered in Petition 1430/2013,[299] seen in chapter 2 of the study.

Legal certainty and predictability will be further enhanced through the introduction of the European Certificate of Parenthood. As already explained in the previous chapter of the study, the Certificate, which will be optional but binding, will be issued – on application by the child or their legal representative – by the Member State having jurisdiction to establish parenthood in accordance with the proposed Regulation. This document will standardise the information to be provided regarding the birth and parenthood of a child. **The issuance of such a Certificate will, thus, be able to save children and their families time and money, in that it will need to be a*utomatically* recognised in every other Member State, without requiring legal translation or legalisation**. This can clearly solve the problems in relation to the formal requirements for documents indicated by, inter alia, national ministries in their feedback and noted in chapter 2 of the Study.

6.2.2. An inclusive instrument which focuses on protecting the rights of *all* children

The proposed Regulation has, at its core, the aim of protecting the rights of the child. This is reflected, inter alia, in its recital 2, which states that the Regulation 'aims to protect the fundamental rights and other rights of children in matters concerning their parenthood in cross-border situations, including their right to an identity, to non-discrimination and to a private and family life, taking the best interests of the child as a primary consideration'. Accordingly, to use the words of other scholars commenting on another Regulation in the private international law area, '[c]hildren can no longer be seen as incidental happenings of the free movement of their parents, but must be regarded as the bearers of rights'.[300]

It would be impossible, nonetheless, for such a child-focused instrument to exclude *some* children from the protection it offers, either because of the way they have been conceived or born, or because of the type of family of which they are a part. Hence, the proposed Regulation is an **inclusive instrument**, **which covers the situation of *every child whose parenthood has been established in an EU Member State***. This is expressed in recital 21 of the proposed Regulation, which is worth quoting here in full:

> 'In conformity with the provisions of international conventions and Union law, this Regulation should ensure that children enjoy their rights and maintain their legal status in cross-border situations without discrimination. To that effect, and in the light of the case law of the Court of Justice, including on mutual trust between Member States, and of the European Court on Human Rights, **this Regulation should cover the recognition in a Member State of the parenthood established in another Member State irrespective of how the child was conceived or born and irrespective of the child's type of family**, and including domestic adoption. Therefore, subject to the application of the rules on applicable law of this Regulation, this Regulation should cover the recognition in a Member State of the parenthood established in another Member State of **a child with same-sex parents**. This Regulation should also cover the recognition in a Member State of the parenthood of a **child adopted domestically** in another Member State under the rules governing domestic adoption in that Member State.'

[299] (n 47).

[300] T. Kruger and L. Samyn, 'Brussels II *bis*: successes and suggested improvements' (2016) 12 Journal of Private International Law 132, p. 155.

In addition, although – as will be explained in the next section – **the proposed Regulation** only applies in situations where parenthood was established in a Member State, recital 24 stresses that it **'should apply regardless of the nationality of the child whose parenthood is to be established, and regardless of the nationality of the parents of the child'**. Hence, the **personal scope** of the Regulation is broad and includes even families comprised exclusively of third-country nationals, provided that the parenthood of the child was established in a Member State.

a. The children of same-sex couples

The proposed Regulation explicitly notes that **rainbow families are covered by it and, thus, the parenthood of the children of same-sex parents established in one Member State will need to be recognised in all other Member States**. This demonstrates that the **proposed Regulation complements the *V.M.A.* ruling,**[301] **by filling the void left by it** – which requires cross-border recognition of parenthood *only* for the purpose of exercising rights derived from EU law – **in that it requires the cross-border recognition of parenthood *for all legal purposes*, including for the purposes of national law** (e.g. for inheritance purposes, for taxation purposes, for maintenance purposes, for custody or the right of parents to act as legal representatives of the child such as in issues relating to schooling or health matters, for the receipt of social and other benefits which do not fall within the scope of EU law, and so on). With the proposed Regulation, rainbow families will feel safe to move to another Member State, to travel within the EU, or to return to their Member State of nationality, without being in danger of seeing the parenthood of their child(ren) extinguished. **This aspect of the proposal, therefore, clearly resolves problems faced by rainbow families in situations such as those at issue in Petition 0513/2016**[302] **(which involved the refusal of recognition of the non-genetic parent in some Member States) and in Petition 0657/2020**[303] **(where it was complained that parenthood was not recognised for the purpose of the grant of family reunification and other rights)**.[304] It should, nonetheless, be emphasised here that **the proposed Regulation in no way interferes with the freedom of Member States to determine whether they shall allow same-sex couples to marry or enter into a civil partnership *under their national law*, or whether they shall make provision *in their national family law* for allowing two persons of the same sex to be *established* as the joint legal parents of a child.** These matters continue to fall within the purview of Member State competence.

That **the Commission has been determined to protect the rights of the children of rainbow families under the proposed Regulation** is not, only, obvious from the numerous references to the 'children of same-sex parents' among its provisions, recitals, as well as in the Explanatory Memorandum attached to the proposal,[305] but also from the following **two 'safety valves' that have been introduced within the proposed Regulation, which can clearly – and, perhaps, mostly – be relevant in situations involving rainbow families, as is acknowledged in the proposal**.

The first safety valve is the clarification that the public policy exception cannot be used to justify the refusal of recognition of parenthood in situations involving rainbow families *on the ground that the parents of the child are two persons of the same sex*. In recital 14 of the proposal as well as in the Explanatory Memorandum attached to it, the Commission inserted a statement (which consolidates the ruling of the CJEU in *V.M.A.*) to the effect that Member States cannot rely on the

[301] (n 16).

[302] (n 40).

[303] (n 43).

[304] Both petitions were considered in chapter 2 of the study.

[305] (n 2).

grounds of public policy or national identity in order to refuse the recognition of the parenthood of the child of two persons of the same sex for the purpose of exercising the rights that the child derives from EU law.[306] In addition, in its Explanatory Memorandum the Commission stated that Member States cannot rely on the ground of public policy in order to disregard the law of another Member State that – under the proposed Regulation – should be applied to establish the parenthood of a child, on the mere ground that the parents are two persons of the same sex.[307] The same statement is made in the proposal with regard to the use of public policy as one of the grounds which appear on the exhaustive list of grounds for refusal of the recognition of parenthood.[308] Hence, following the coming into force of the proposed Regulation, **it will not be possible for any Member State to rely on the grounds of public policy or national identity to justify a refusal to allow the establishment of parenthood – in a cross-border situation – by two persons of the same sex or a refusal to recognise the parenthood of a child by two persons of the same sex**.

Of course, **Member States will still be able to rely on the ground of public policy to refuse the establishment or recognition of parenthood in a cross-border context – as required by the proposed Regulation – as long as this is not based on a reason amounting to a violation of fundamental rights, such as in order to exclude the children of same-sex couples**. Hence, astute Member States wishing to refuse to recognise the parent-child relationship between a child and a parent on the ground that the parents are persons of the same sex, might try to base their refusal on the ground of public policy, albeit without admitting that the actual reason behind it is that they wish to discriminate against rainbow families. **Accordingly,** as will be suggested subsequently in the chapter (see Recommendation 7), **national authorities and courts applying the Regulation – and the EU Commission when monitoring the application of the instrument at the national level –** will need to bear this in mind and **will need to ensure that there are sufficient safeguards so that public policy is not abusively used by the Member States in order to depart from the rules laid down in the Regulation** regarding the establishment or recognition of parenthood in a cross-border context, **in a way that discriminates against rainbow families, in breach of fundamental rights protected under EU law.**

The **second safety valve was inserted in order to ensure that the parent-child relationship between a child and both parents can always be established provided that at least one of the Member States with which the family has points of contact would permit that.** The general rule regarding the applicable law for the establishment of parenthood in cross-border situations is stated in Article 17(1) of the instrument, which – as we saw in the previous chapter – indicates that the applicable law is the law of the State of habitual residence of the person giving birth at the time of birth or, if this cannot be determined, the law of the State of birth of the child. However, '[i]n order to address the most frequent problems with the recognition of parenthood occurring today, by way of exception to the above-mentioned rule',[309] **Article 17(2) provides that 'where the applicable law pursuant to paragraph 1 [of Article 17] results in the establishment of parenthood as regards only one parent, the law of the State of nationality of that parent or of the second parent, or the law of the State of birth of that child, may apply to the establishment of parenthood as regards the second parent'.**

[306] Explanatory Memorandum attached to the proposal (n 2), p. 11

[307] Explanatory Memorandum attached to the proposal (n 2), p. 15.

[308] Explanatory Memorandum attached to the proposal (n 2), p. 16.

[309] Explanatory Memorandum attached to the proposal (n 2), p. 14.

Recital 52 of the proposal, makes direct reference to the children of same-sex couples and thus – together with the statements made in the Explanatory Memorandum[310] - demonstrates **that it is mainly rainbow families that were in the Commission's mind when drafting the Article 17(2) exception**: 'By way of exception, where the law applicable as a rule results in the establishment of parenthood as regards only one parent (**for example, only the genetic parent in a same-sex couple**), either of two subsidiary laws, namely the law of the State of nationality of either parent or the law of the State of birth of the child, may be applied to establish parenthood as regards the second parent (**for example, the non-genetic parent in a same-sex couple**)'.

This exception, therefore, will be of practical relevance to same-sex couples whose situation presents points of contact with more than one Member State and who are habitually resident – or where the child was born - in a Member State that does not allow two persons of the same sex to be recognised as the joint legal parents of a child. This is because in situations where a rainbow family is habitually resident in a Member State whose laws will allow the parent-child relationship between the child and both (same-sex) parents to be established – or, alternatively, the child is born in such a Member State – there will be no need for the family to resort to the Article 17(2) exception. It should be noted, nonetheless, that **the Article 17(2) exception still leaves certain rainbow families – namely those who happen not to have points of contact with *any* Member State that allows two persons of the same sex to be established as the joint legal parents of the child – unable to establish the filiation of the child with both parents.** There is, however, nothing that an EU measure can do about this gap in protection, as the EU does not have the competence to require Member States to change their substantive family laws. After all, as the Commission has been at pains to emphasise in the various documents accompanying the proposal, the latter 'does not interfere with substantive national law on the definition of family'.[311]

The 'safety valve' provided in Article 17(2) ensures not only **that the filiation** between the child and both (same-sex) parents can be established but, also, that *it* ***will be recognised by all Member States***. In this way it **resolves the problem – in cases of a family breakdown – of a possible (ab)usive use of the differences in national laws by the (genetic) parent whose filiation with the child is recognised in *all* Member States, in order to exclude the parent whose filiation with the child is not recognised in all Member States** (for an example of this problem see Petition 1038/20, mentioned in chapter 2[312]).

b. Surrogate-born children

As noted earlier in this study, surrogate-born children – together with the children of rainbow families and the children of unmarried parents – **are disproportionately affected by the problem of non-recognition of parenthood in a cross-border context**. In line with its decision to propose an *inclusive* instrument that will offer a complete solution to the problem of the non-recognition of parenthood within the EU, **the Commission has included surrogate-born children within the scope of the proposed Regulation**. In addition to the statement in recital 21, according to which it covers the recognition of parenthood established in a Member State 'irrespective of how the child was conceived or born' – which appears to point to the fact that surrogate-born children are included within the scope of the proposed Regulation – there are also a number of other (direct) references to surrogacy within the instrument as well as in the Explanatory Memorandum accompanying it, which make it clear that

[310] Explanatory Memorandum attached to the proposal (n 2), p. 14.

[311] Explanatory Memorandum attached to the proposal (n 2), p. 7.

[312] (n 45).

situations involving the parenthood of surrogate-born children are covered by it.[313] **Hence, with the coming into force of the proposed Regulation in its current form, the problem of non-recognition of parenthood established within the EU between surrogate-born children and their intended parents, will no longer be encountered**, whether the parents are two persons of the same sex (such as in Petition 0712/2020 seen in chapter 2 of the Study[314]) or an opposite-sex couple (as in one of the examples noted in the same chapter).

The Commission's decision to include surrogate-born children within the scope of the Regulation is a bold move, in that objections to the inclusion of situations involving surrogacy within the scope of the instrument have been expressed by several (mainly Christian) **organisations, prior to, and following, the publication of the proposal**.[315] A few months before the publication of the proposal, one such organisation submitted (through a representative) a petition to the PETI committee of the European Parliament, arguing that surrogacy should be expressly excluded from the initiative; this was based, inter alia, on the argument that 'the systematic imposition on a Member State of recognition by the EU of surrogacy, whether for paternity originally recognised in another Member State or in a third country, would de facto encourage and mean legal acceptance of surrogacy, despite the serious violations of the fundamental rights of women and children inherent in this practice'.[316]

It should nonetheless be emphasised here that **the proposed Regulation in no way interferes with the freedom of Member States to determine whether and – if yes – how to regulate surrogacy *under their national law***: surrogacy continues to be a matter of substantive family law that falls within Member State competence. What the Regulation will do – once and if it comes into force – **is simply to require Member States to *recognise* the parent-child relationship between a child and the (intended) parents**, ***as this was established in another EU Member State***. In other words, the proposed Regulation shall simply require the **continuation of the filiation – established in an EU Member State –** of the surrogate-born child, in every other Member State.

In fact, as seen in chapter 3 of the study, **according to ECtHR jurisprudence, EU Member States are already required by the ECHR** (to which all are signatory States) **to recognise, in certain circumstances, the parent-child relationship between surrogate-born children and their intended parents**, and this is so even where the parenthood was established in a third country: the refusal of recognition of parenthood in such circumstances constitutes a violation of the surrogate-

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[313] See Explanatory Memorandum attached to the proposal (n 2), p. 4. See, also, recital 18 of the proposed Regulation, which provides the following: 'Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('European Convention on Human Rights') lays down the right to respect for private and family life, while Article 1 of Protocol No. 12 to the said Convention provides that the enjoyment of any right set forth by law must be secured without discrimination on any ground, including birth. The European Court of Human Rights has interpreted Article 8 of the Convention as requiring all States within its jurisdiction to recognise the legal parent-child relationship established abroad between a child born out of surrogacy and the biological intended parent, and to provide for a mechanism for the recognition in law of the parent-child relationship with the non-biological intended parent (for example through the adoption of the child)'.

[314] (n 42).

[315] See, for instance, Federation of Catholic Family Associations in Europe (FAFCE) Press Release 'The dangers of a "European Parenthood Certificate' (3/2/2023) https://www.fafce.org/press-release-the-dangers-of-a-european-parenthood-certificate/; Christian Network Europe 'Catholic organisations in Austria oppose European surrogacy proposal' (10/2/2023) https://cne.news/artikel/2550-catholic-organisations-in-austria-oppose-european-surrogacy-proposal.

[316] Petition No 0762/2022 by Marie-Josèphe Devillers (French), on behalf of CIAMS (Coalition Internationale pour l'Abolition de la Maternité de Substitution), on the express exclusion of filiation by surrogacy from the initiative on the recognition of parenthood in the EU (https://www.europarl.europa.eu/petitions/en/petition/content/0762%252F2022/html/Petition-No-0762%252F2022-by-Marie-Jos%25C3%25A8phe-Devillers-%2528French%2529%252C-on-behalf-of-CIAMS-%2528Coalition-Internationale-pour-l%25E2%2580%2599Abolition-de-la-Mater).

born children's right to respect for private life, laid down in Article 8 ECHR. Accordingly, the proposed Regulation does not impose on Member States a new obligation with regard to the cross-border recognition of parenthood of surrogate-born children. Moreover, the inclusion within the personal scope of the proposed Regulation of surrogate-born children appears to be required also by **Article 7 of the Charter**, which concerns, inter alia, the right to respect for private life. This provision must be interpreted *at least* in the same way as the ECtHR has interpreted Article 8 ECHR in its case-law concerning the cross-border recognition of surrogacy, given that Article 52(3) of the Charter provides that 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

Taking into account the fervent objections – in some quarters – to the inclusion of surrogacy within the scope of the proposed Regulation, **it is hoped that faced with the prospect of the threat of a veto in the Council by one or more Member States, EU institutions will not bow to pressure and amend the instrument in order to exclude surrogate-born children from its scope**. This is for two reasons.

First, given that the aim of the proposed Regulation is to protect and respect the fundamental rights – and best interests – of children, it will be difficult to justify the exclusion from its protection (*and the continuing violation of their right to respect for private life,* as established in the ECtHR case-law analysed in chapter 3 of the study) of surrogate-born children. In particular, **such an exclusion would amount to discrimination based on birth contrary to Article 21 of the Charter**, as it would penalise surrogate-born children because of the way they were conceived, carried, and given birth to. In the hierarchy of EU norms, the Charter is placed above legislative acts, such as the proposed Regulation; hence, if the proposed Regulation violates one or more provisions of the Charter, this will constitute a reason for **challenging its validity** through an Article 258 TFEU action.

Second, as ECHR signatory States, **all EU Member States are already required by the ECtHR case-law** – analysed in chapter 3 of this study – **to recognise, in certain circumstances, the parenthood of surrogate-born children as this was established in another country**; in addition, as explained in the previous paragraph, Article 52(3) of the Charter requires the interpretation of its provisions (including Article 7) in a way which imposes on EU Member States at least the same obligations as those that the ECHR – as interpreted by the ECtHR – imposes on its signatory States. Accordingly, in practice, the inclusion within the personal scope of the proposed Regulation of surrogate-born children does not impose a new recognition obligation on Member States, as they are anyway already bound by such an obligation by the ECtHR jurisprudence, through their ECHR membership as well as under the Charter, which must be interpreted as granting protection which is at least equivalent to that provided by the ECHR. **(Recommendation 4)**

6.3. The gaps in protection and the challenges ahead

In this part of the chapter, the focus will be on the **gaps in protection** that shall remain even if the proposed Regulation comes into force in its current form. It will also be considered which **challenges** the proposed Regulation may face both whilst it is discussed before EU institutions and (if it is approved unanimously in the Council) after it becomes legally binding.

6.3.1. The special position of Denmark and Ireland

Title V ('Area of freedom, security and justice) of Part Three ('Union policies and internal actions') of the TFEU does not apply to all Member States, as special arrangements for specific Member

States have been agreed through Protocols attached to the Treaties. Thus, judicial cooperation in civil matters has been characterised as 'a sort of enhanced cooperation as not all of the Member States [..] participate in it'.[317]

According to Protocol (No 22) on the position of Denmark,[318] **legal measures adopted under Title V of part Three of the TFEU do not bind or apply in Denmark**. The first paragraph of Article 1 of the Protocol provides that 'Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union. The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the decisions of the Council which must be adopted unanimously'. Moreover, Article 2 of the Protocol notes that 'None of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice of the European Union interpreting any such provision or measure or any measure amended or amenable pursuant to that Title shall be binding upon or applicable in Denmark; and no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to Denmark […]'. Hence, **the proposed Regulation will not apply to Denmark, should it come into force**.

In addition, according to **Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice**,[319] **Ireland is not bound by measures adopted in the area of justice under Title V of Part Three of the TFEU**. In particular, Article 1 of the Protocol provides that Ireland 'shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union', while Article 2 provides that none of the provisions or measures taken pursuant to that Title shall be binding or applicable in Ireland. However, **Article 3(1) of the Protocol offers an 'opt-in' mechanism,** as it provides that once a proposal has been presented in this area, Ireland can notify its wish to take part in the adoption and application of the measure and, according to Article 4, once the measure has been adopted, Ireland can notify its wish to accept that measure. At the moment, **there is no information regarding the position of Ireland, though, until now, it has systematically opted-in to EU private international law measures**.

It is clear that the objectives of the proposed Regulation will be best achieved if all Member States are bound by it. Accordingly, **one of the recommendations of this study is that the Commission and the Member States need to work together in order to persuade Ireland to make use of the procedure laid down in Articles 3 and 4 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, to opt-in to the adoption and application of the measure and to accept to be bound by it (Recommendation 5)**.

6.3.2. The absence of any safeguards ensuring that the child will maintain the right to know its origins

It is a well-established principle of international human rights law that children who do not know one or both of their biological parents have an interest to identify them and have the right to know their

[317] For a more detailed explanation of the position of these two countries see S. Bariatti (n 124), p. 11.

[318] [2012] OJ C 326/299. The full text of the Protocol is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F22.

[319] [2016] OJ C 202/295. The full text of the Protocol is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E%2FPRO%2F21.

conditions of birth. **This right of the child to know its origins, is broadly recognised and respected as part of the child's right to identity**.[320] In practice, this right is important for 'children whose biological parentage has been split from their social or even from their birth parentage', and it would thus clearly apply to adopted children, children conceived through ART, or the children of single parents.[321]

The ECtHR has held that the right to know one's origins is an essential part of the right to respect for private life, which is protected under Article 8 ECHR.[322] Moreover, **the CRC makes explicit reference to this right** in Article 7(1), which provides that '[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, *as far as possible*, *the right to know* and be cared for by *his or her parents*'.[323] The inclusion of the words 'as far as possible' demonstrates that **this is not an absolute right, and must be balanced with the rights of others**, such as the rights to privacy or autonomy of the parents, the mother's husband, or the gamete donor, **or** – even – **the child's other rights and best interests.**[324] This reading is also confirmed by the fact that Article 8 ECHR – which is the provision from which the right to know one's origins stems in the ECHR context – recognises in its second paragraph the possibility to restrict the right to respect for private life (and, thus, the right to know one's origins), when it conflicts with other rights.

Although the proposed Regulation aims, inter alia, 'to protect the fundamental rights and other rights of children in matters concerning their parenthood in cross-border situations, including their right to an identity',[325] **it, nonetheless, does not make any provision for ensuring that the right of the child to have access to its origins will be safeguarded**. **Such an addition would better safeguard the rights of the child** and, thus, would further enhance the child-centred character of the instrument. What is more, **it could help to win over some of the more reluctant Member States**, as it would underline that the aim of the instrument is, indeed, to protect the rights of the child rather than to protect the rights of the parents.

It is therefore recommended that a provision is added to the proposed Regulation, which will state that in all procedures concerning the establishment and recognition of parenthood which fall within the scope of application of this instrument, the right of the child to know its origins should, as far as possible, be protected (Recommendation 6).

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320 I. Pretelli (n 6), pp. 13-15; S. Besson, 'Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 International Journal of Law, Policy and the Family 137, p. 138. For academic analyses of this right see, inter alia, K. O'Donovan, 'A right to know one's genetic parentage?' (1988) 2 International Journal of Law, Policy and the Family 27; J. Triselotis, *In Search of Origins: The Experiences of Adopted People* (Routledge, 1973); G. A. Steward, 'Interpreting the child's right to identity in the UN Convention on the Rights of the Child' (1992) 26 Family Law Quarterly 221.

321 S. Besson (n 320), p. 138.

322 *Gaskin v. United Kingdom*, App. no. 10454/83 (ECtHR, 1989) (https://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22695368%22],%22itemid%22:[%22001-57491%22]}); *Mikulic v. Croatia*, App. no. 53176/99 (ECtHR, 2002) (https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-60035%22]%7D); *Ebrü v. Turkey*, App. no. 30733/08 (ECtHR, 2018) (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183862%22]}).

323 Emphasis added.

324 S. Besson (n 320), pp. 146-148.

325 Recital 2 of the proposal.

6.3.3. The public policy exception

As already noted, under the proposed Regulation the **public policy exception can be relied on by Member States in order to depart from their obligations regarding the establishment or recognition of parenthood laid down in this instrument**.

The inclusion of a public policy exception in the proposal does not constitute a surprise, as this exception is 'recognised in common law rules, embodied in statutory codifications of private international law, including those operating between European states otherwise bound by principles of mutual trust, and is a standard feature of international conventions on private international law. It has even been suggested that it is a general principle of law which can thus be implied in private international law treaties which are silent on the issue'.[326] All other EU private international law instruments in family matters include a public policy exception, which is expressed along the lines that this has been formulated in the proposed Regulation.

One of the challenges that will ensue in the application of the proposed Regulation **will be to ensure that the public policy exception is not abusively used by Member States to avoid the obligations imposed on them by this instrument for reasons which are not, in reality, based on their public policy**.

A number of safeguards have already been developed by the CJEU in order to ensure that the public policy exception – as applied in other areas of EU law – is not inappropriately used by the Member States in order to unjustifiably derogate from their obligations under EU law. And there is, indeed, **no reason to consider that the national authorities or courts that will assess whether this exception is made out – or the CJEU when interpreting it – will follow a different approach towards the exception in the context of the proposed Regulation**.

The notion of public policy, as an exception to the uniform private international law rules established at EU level, has been interpreted narrowly.[327] The same has been the case with the public policy exception in EU free movement law.[328] Hence, **it is expected that Member States will only be allowed to use the exception sparingly and on a case-by-case basis, in order to be able, *exceptionally*, to depart from their obligations under the proposed instrument.**

What is more, apart from interpreting the exception narrowly, a number of **safeguards have been built into the public policy assessment process**, in order to ensure that the exception is not abused by the Member States or used in a manner that amounts to a violation of EU law. Thus, as noted in the previous section – and as emphasised in the text of the proposed Regulation – **the exception can under no circumstances be used to allow Member States to refuse to apply the law of another Member State for the purpose of establishing parenthood or to recognise parenthood established in another Member State *where this will amount to a violation of fundamental rights protected under EU law***. Hence, no Member State will be able to rely on it when this will be contrary to

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[326] A. Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201. See, also, J. Kosters, 'Public Policy in Private International Law' (1920) 29 Yale Law Journal 745, pp. 748-749.

[327] Case C-7/98, *Krombach* ECLI:EU:C:2000:164 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0007&qid=1679052285915); Case C-38/98, *Régie Nationale des Usines Renault SA* ECLI:EU:C:2000:225 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0038&qid=1679052311315).

[328] Case 41/74, *Van Duyn* ECLI:EU:C:1974:133 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61974CJ0041); Case 36/75, *Rutili* ECLI:EU:C:1975:137 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61975CJ0036&qid=1679052409577); Case 30/77, *Bouchereau* ECLI:EU:C:1977:172 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61977CJ0030&qid=1679052446883)

the fundamental rights and the best interests of the child. In addition, as in every assessment of a derogation from an obligation imposed by EU law, **the principle of proportionality will have an important role to play as well in ensuring that appropriate limits are placed on the public policy exception in the context of this Regulation**.

Accordingly – and as suggested also earlier in this chapter – it is **recommended that the Commission** as guardian of the Treaties **must ensure that the public policy exception** laid down in the proposed Regulation **is interpreted restrictively and that the Member States will be allowed to rely on it exceptionally and only when there is a genuine danger to public policy and when this is proportionate and does not amount to a violation of fundamental rights and does not contradict the best interests of the child (Recommendation 7). The above requirements** with regard to the interpretation and application of the public policy exception **should also be noted by the Commission in the guidelines that – as per Recommendation 1 – it should issue on the application and enforcement of the proposed Regulation once and if it comes into force.**

6.3.4. The limited territorial scope of the proposal

One of the most important limits placed on the scope of application of the proposed Regulation is that the requirement of recognition of the parent-child relationship applies only in situations where parenthood was established in a Member State. Hence, it does not apply in situations where parenthood was established in a third State. Article 3(3) of the instrument provides that '[t]his Regulation shall not apply to the recognition of court decisions establishing parenthood given in a third State, or to the recognition or, as the case may be, acceptance of authentic instruments establishing or proving parenthood drawn up or registered in a third State'.[329]

Further guidance has been provided by the Commission's Explanatory Memorandum attached to the proposal,[330] where the following is noted:

> 'Article 3 determines the scope of the proposal. The rules on jurisdiction and applicable law apply where parenthood is to be established in a Member State in cross-border situations. The rules on the recognition of parenthood apply where the parenthood to be recognised has been established in a Member State, so the proposal does not cover the recognition or, as the case may be acceptance, of court decisions and authentic instruments establishing or proving parenthood drawn up or registered in a third State. **In these cases, recognition or acceptance remain subject to the national law of each Member State**. However, the proposal applies to the recognition of the parenthood of all children, regardless of their nationality and the nationality of their parents, provided their parenthood has been established in a Member State and not in a third State.'

[329] In the study 'A European Framework for private international law: the current gaps and future perspectives' requested by the Committee on Legal Affairs of the European Parliament (2012) (available here: https://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf), the following was explained when referring to the limited territorial scope of application of other EU instruments in the field of family law: 'Recognition and enforcement of judgments or authentic instruments under the Brussels Regulations, the Maintenance Regulation or the Succession Regulation is only possible when the judgment or authentic instrument emanates from a Member State. National rules still determine whether a foreign decision from a third state can be recognised or enforced. It must be noted that a court decision to grant enforcement to a decision from a third state on the basis of national law or on the basis of treaty obligations of the Member State in question, does not transform the original decision into a court decision from a Member State that must subsequently be recognised under one of the relevant regulations' – pp. 66-67.

[330] Explanatory Memorandum attached to the proposal (n 2), p. 12.

Hence, **the proposed Regulation will apply in order to require the cross-border recognition of parenthood only in situations where parenthood was established in a Member State**. In instances **where parenthood was established in a third country, it will fall on the Member State where recognition is sought to determine whether it will *recognise*** the parenthood so established, **in accordance with its national legislation** concerning the recognition of parenthood established abroad.

This means that **families wishing to bring themselves within the protection of the proposed Regulation** (e.g. because they will frequently move between Member States and thus will need to ensure that the parenthood of their children will be recognised everywhere they move within the EU) will be advised to **seek to have the parenthood of their children (re-)*established* in an EU Member State**. **Whether this will be possible will depend on the national legislation of the Member State** where re-establishment of parenthood is sought: the Member State will be asked to determine parenthood *de novo* for the child(ren) based on its national rules and will thus only (re-)establish parenthood if this corresponds with the result prescribed by those rules.

This limitation on the territorial scope of application of the proposed instrument leaves a significant gap in the protection afforded by it. Children whose parenthood happens to have been established in a third State (as opposed to a Member State) will continue facing uncertainty regarding their legal status every time they move within the EU and may even be faced with refusals of recognition of their relationship with one or both of their parents, given that their situation will be governed by the national law of the Member State where recognition is sought. Hence, **this limitation means that the problems of non-recognition of the parenthood of the children noted in Petition 1179/2020 will not be resolved, due to the fact that the parenthood of the family's children was established in a third State.**[331] What is more, this limitation is bound to **disproportionately affect surrogate-born children**, **in view of the fact that in the majority of instances this group of children had their parenthood established in a third State,** since it is only a handful of Member States that allow (with conditions) the use of this method of ART in their territory.

Accordingly, it is recommended that **the Commission should consider extending the territorial scope of application of the proposed Regulation to situations where parenthood was established in a third State (Recommendation 8)**. This is for two reasons.

First, given that the aim of the proposed Regulation is to protect and respect the fundamental rights – and best interests – of children, it will be difficult to justify the exclusion from its protection (*and the continuing violation of their right to respect for private life* under Article 8 ECHR, as established in the ECtHR case-law analysed in chapter 3 of the study) of *some* children, namely, children who happened to have been born in a third State where their parenthood was established. In particular, **such an exclusion amounts to discrimination based on birth contrary to Article 21 of the Charter**.

Second, as ECHR signatory States, **all EU Member States are already required by Article 8 ECHR – as interpreted by the ECtHR in its case-law analysed in chapter 3 of this study – to recognise the parenthood of (surrogate-born and adopted) children, as this was established *in any country (including in a third country)*:** accordingly, in practice, the extension of the territorial scope of the proposed Regulation to cover situations where parenthood was established in a third country would not impose a new obligation on EU Member States, as they are already bound by such an obligation by the ECtHR jurisprudence, through their ECHR membership. Furthermore, as noted earlier, such an

[331] (n 41).

obligation can be read as stemming from **Article 7 of the Charter** which lays down, inter alia, the right to private life, since – as noted earlier – Article 52(3) of the Charter provides that Charter rights which correspond to ECHR rights must be interpreted in a way which grants *at least* the same protection as granted by the ECHR rights.

6.3.5. The legal basis and the problem of unanimity

The last challenge that will be mentioned here is the most significant one, in that it will determine the fate of the proposed Regulation. This is the **possibility that the requisite unanimity in the Council** – which, as will be explained below, is required as a result of the legal basis that has been chosen for the measure – **will not be attained** as a result of one or more Member States voting against the instrument.

As is well-known, every Union action requires at least one legal basis. Failure to use the correct legal basis or bases can lead to annulment of the measure by the CJEU, in accordance with the procedure laid down in Article 263 TFEU or through an indirect challenge under the preliminary rulings procedure. **The Commission has chosen Article 81(3) TFEU as the sole legal basis for the proposed Regulation**. This provides that 'measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a **special legislative procedure**. The Council shall act **unanimously** after **consulting** the European Parliament'.[332]

There have, indeed, been suggestions,[333] that the provision that should be used as the legal basis for this instrument is Article 21(2) TFEU, which provides for the use of the ordinary legislative procedure, which requires qualified majority voting – rather than unanimity – to be attained in the Council. After all, as rightly noted by another scholar, '[t]he need of unified private international law rules on issues of family law stems from the free movement of persons, one of the fundamental freedoms of the EU'.[334] The argument in favour of the use of Article 21(2) TFEU as the legal basis is in particular that the proposed Regulation is effectively a free movement instrument, as it shall prevent the emergence of obstacles to free movement within the EU that would ensue as a result of the non-recognition of parenthood established in a Member State and it shall, therefore, facilitate the exercise of free movement rights by Union citizens. **Nonetheless, given that the proposed Regulation shall also apply to the establishment and recognition of parenthood in cross-border situations *irrespective of the nationality of the child or the parents* and, thus, shall also cover parenthood in situations involving families comprised exclusively of third-country nationals, this means that Article 21(2) TFEU cannot be used as its sole legal basis**.

It is of course possible for a measure to be adopted on two or more legal bases,[335] provided that two or more inseparable objectives can be accredited to the proposed measure[336] *and* the legislative procedures prescribed by them do not present irreconcilable differences, such as that one requires that the proposal is adopted by unanimity in the Council and the other one by qualified majority voting. **This, however, is not the case for Article 21(2) TFEU**, which requires that measures

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[332] As noted by academic commentators, 'The obvious lack of political will to put the (declared) protection of the best interest of a child above all else (pursuant to Article 24 sect. 2 of the Charter of Fundamental Rights of the EU) is reflected in this special unanimity procedure preserved for the measures of family law *acquis*' - M. Župan and V. Puljko, 'Shaping European Private International Family Law' (2010) 7 Slovenian Law Review 23, p. 43.

[333] See, for instance, study 'Obstacles to the Free Movement of Rainbow Families in the EU' (n 38).

[334] N. A. Baarsma (n 126), p. 79.

[335] A. Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer, 2018), p. 9.

[336] A. Engel (n 335), p. 83.

are adopted through the ordinary legislative procedure and by qualified majority voting in the Council, **and Article 81(3) TFEU**, which, as noted earlier, requires the use of the special legislative procedure and unanimity in the Council.

In any event, **the Commission has insisted on its original position**, **arguing that the only appropriate legal basis for the measure is Article 81(3) TFEU**, which is *lex specialis* to Article 21(2) TFEU.[337]

Accordingly, as things stand at present, **in order for the proposal to come into force, it will need to be approved by all Member States in the Council** (apart from Denmark and, depending on its position, Ireland, for the reasons explained earlier in this section). The Commission, therefore, **needs to work hard in order to convince *all* Member States to approve in the Council the proposal, (at least[338]) as it is.**

The important question, of course, is **what will happen in case unanimity in the Council is impossible to reach**. In such a scenario, **there are three options**.

The **first option** is to **continue negotiations on the original proposal until all Member States are willing to approve it *in its current form.*** The recent experience with the proposal for an Equality Directive,[339] which lays dormant since 2008 due to the fact that unanimity in the Council has been impossible to achieve, does not allow us to be hopeful that unanimity will be achieved soon or that if the current proposal is blocked in the Council, it will be able to be resuscitated after a few years. The fact that the approval of the proposal would be delayed for years, without a time limit and with dubious chances of success, makes this option unsatisfactory.

The **second option** is to **continue negotiations in the Council *and to amend the proposal* in such a way that will ensure that all Member States will vote in favour of it**. This will, nonetheless, mean that the proposed instrument will end up being a watered-down version of the original. In particular, the most controversial aspects of the proposal – which are the ones that will probably need to be removed in order to attain unanimity – are those that solve the most significant problems that are currently encountered in cross-border situations, namely, the non-recognition of parenthood in situations involving the children of same-sex couples and surrogate-born children. Accordingly, securing the approval of every single Member State will bring with it the danger of stripping the proposed Regulation of its most important – and most-needed – provisions.

The **third option** is **to proceed with the adoption of the proposal by only certain Member States, through enhanced cooperation,** foreseen by Article 20 TEU and Articles 326-334 TFEU. Enhanced cooperation, introduced formally for the first time by the Treaty of Amsterdam in 1999, 'is a process whereby a group of Member States (which is not pre-defined) is allowed by the European organs to adopt new rules (in an area which is not pre-defined) using the institutions, mechanisms and procedures established by the treaties provided a (large) number of formal and substantial conditions

[337] That Article 21(2) TFEU is a lex generalis provision is obvious from the fact that it gives competence to EU institutions to act '[i]f action by the Union should prove necessary to attain this objective *and the Treaties have not provided the necessary powers*'.

[338] 'At least', given that – as recommended in this chapter – there is clearly scope for some improvement in the text of the proposed Regulation.

[339] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 final. The full text of the proposal is available here: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52008PC0426.

are met'.[340] Thus, if one or more Member States will vote against the proposal in the Council, the remaining Member States – provided they will be **at least nine** – may, as a last resort,[341] make a **request to the Commission to submit a proposal for enhanced cooperation**. If the Commission submits such a proposal, **authorisation** to proceed will need to be granted by the **Council**, after obtaining the **consent of the European Parliament**. Enhanced cooperation has previously been used in this field, as a last resort, for the adoption of Regulations 2016/1103,[342] 2016/1104,[343] and 1259/2010 (Rome III),[344] due to the fact that unanimity in the Council could not be attained.

Although the adoption of the proposal through enhanced cooperation would have the benefit that the proposal would come into force – in its original version (and perhaps even with some improvements) – practically, its adoption through enhanced cooperation would achieve very little. This is due to the fact that the Member States that are likely to reject it in the Council are those where the most significant problems of non-recognition of parenthood are encountered and, thus, the measure will not apply in the Member States where it is mostly needed. Accordingly, **although this option will, at least, mean that in the event of a deadlock, the proposal will not be shelved for an unspecified period of time, it will achieve very little in practice.**

Accordingly, **it is recommended that due to the requirement of unanimity in the Council laid down in the legal basis chosen by the Commission, the latter needs to work hard in order to convince *all* Member States to approve in the Council the proposal, (at least) as it is**. **The endless continuation of negotiations on the original proposal until – in some unspecified date in the future – there is appetite for its adoption by all Member States, the approval of a watered-down version of the original proposal, or the adoption of the proposal through enhanced cooperation by only some Member States, are not satisfactory alternatives in case it is not possible to reach unanimity in the Council (Recommendation 9).**

[340] See A. Fiorini, 'Harmonizing the Law applicable to divorce and legal separation – enhanced cooperation as the way forward?' (2010) 59 International and Comparative Law Quarterly 1143, pp. 1146-1147. See also D. Thym, 'The political character of supranational differentiation' (2006) 31 European Law Review 781.

[341] Article 20(2) TEU. For a detailed analysis of enhanced cooperation see R. Böttner, *The Constitutional Framework for Enhanced Cooperation in EU law* (Brill, 2021).

[342] Council Regulation 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L 183/1. The full text of the Regulation is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1103.

[343] Council Regulation 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L 183/30. The full text of the Regulation is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1104.

[344] Council Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L 343/10. The full text of the Regulation is available here: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32010R1259.

7. CONCLUSIONS AND RECOMMENDATIONS

The proposal under examination in this study is, clearly, **a very positive step towards a wholesome EU solution to the problem of non-recognition of parenthood in the EU**. The proposed Regulation – if and when it comes into force – **will enhance legal certainty and will, as a result, save time and costs,** both for families whose situation presents a cross-border element but, also, for the judicial and administrative authorities of Member States that are involved in the process of establishing and recognising legal parenthood. Legal certainty and predictability will be further enhanced through the introduction of the European Certificate of Parenthood. **The proposed Regulation has at its core the aim of protecting the rights of the child and this is reflected, inter alia, in the fact that it is an inclusive, child-focused, instrument which covers the situation – and thus protects the rights – of *every child* whose parenthood has been established in an EU Member State.** If it comes into force, the proposed Regulation will, therefore, solve many of the problems and difficulties encountered by families in a cross-border context.

Nonetheless, in chapter 6, it was explained that **there are a number of gaps in protection that will persist even if the proposed Regulation will enter into force**: **the proposed Regulation will not apply to Denmark and it is not clear if Ireland will exercise its opt-in to be bound by it**; it has a **limited territorial scope** in that it excludes all situations where parenthood is established in a third country; it **includes no safeguards for protecting the child's right to know its origins**; and **it includes a public policy exception, which – unless it is ensured that it is interpreted narrowly – may be abused by the Member States in order to avoid their obligations under the instrument**. Nonetheless, **the biggest challenge will be to ensure that the proposal will, indeed, come into force**. As explained in chapter 6, obtaining the unanimous approval of the proposal by all Member States in the Council – as is required by the legal basis chosen – is bound to be an uphill struggle and, in the end, may prove impossible. In such an event, three alternative options are available, however, for the reasons explained, neither of them is satisfactory.

Accordingly, **as a response to the above gaps and challenges, the study makes the following recommendations**:

(1) In order to improve the clarity of the instrument and the predictability of the outcome of cases and scenarios where it will apply, it is recommended that (if and) once the proposed Regulation comes into force, the **Commission should issue guidelines** on its application and enforcement. These guidelines should be issued in simple language in order to make the instrument more accessible to families and generally to the public with no special legal knowledge.

(2) In order to improve the clarity of the instrument and the predictability of the outcome of cases and scenarios where it will apply, it is recommended that (if and) once the proposed Regulation comes into force, national judges, civil servants, and legal practitioners should receive **training** in order to be able to interpret and apply the Regulation uniformly.

(3) In order to improve the clarity of the instrument and the predictability of the outcome of cases and scenarios where it will apply, it is recommended that (if and) once the proposed Regulation comes into force, whenever there will be doubt as regards the interpretation of a provision of the proposed Regulation, national judges should use the **preliminary ruling mechanism in order to obtain an authoritative interpretation of it from the CJEU** which will be uniformly applicable in all Member States.

(4) **EU institutions should not amend the instrument in order to exclude surrogate-born children from its scope**. This is for two reasons.

First, given that the aim of the proposed Regulation is to protect and respect the fundamental rights – and best interests – of children, it would be difficult to justify the exclusion from its protection (*and the continuing violation of their right to respect for private life,* as established in the ECtHR case-law analysed in chapter 3 of the study) of surrogate-born children. In particular, **such an exclusion would amount to discrimination based on birth contrary to Article 21 of the Charter**, as it would penalise surrogate-born children because of the way they were conceived, carried, and given birth to. Such discriminatory exclusion could constitute a reason for challenging the validity of the instrument through an Article 258 TFEU action.

Second, as ECHR signatory States, all **EU Member States are already required by the ECtHR case-law** – analysed in chapter 3 of this study – **to recognise**, in certain circumstances, **the parenthood of surrogate-born children established in another country**; in addition, Article 52(3) of the Charter requires the interpretation of its provisions in a way which imposes on EU Member States at least the same obligations as those that the ECHR – as interpreted by the ECtHR – imposes on its signatory States. Accordingly, in practice, the inclusion within the personal scope of the proposed Regulation of surrogate-born children **does not impose a new recognition obligation on Member States**, as they are anyway already bound by such an obligation by the ECtHR jurisprudence, through their ECHR membership as well as under the Charter, which must be interpreted as granting protection which is at least equivalent to that provided by the ECHR.

(5) The Commission and the Member States need to work together in order to persuade **Ireland** to make use of the procedure laid down in Articles 3 and 4 of Protocol (No 21) on the position of the UK and Ireland in respect of the area of freedom, security and justice, to **opt-in** to the adoption and application of the measure and to accept to be bound by it.

(6) A **provision should be added** to the proposed Regulation stating that in all procedures concerning the establishment and recognition of parenthood which fall within the scope of application of this instrument, the **right of the child to know its origins** should, as far as possible, be protected.

(7) The Commission as guardian of the Treaties must ensure that the **public policy exception** laid down in the proposed Regulation is **interpreted restrictively** and that the **Member States** are allowed **to rely on it exceptionally** and only when there is a genuine danger to public policy and when this is proportionate and does not amount to a violation of fundamental rights and does not contradict the best interests of the child. The **above requirements** regarding the interpretation and application of the public policy exception **should also be noted by the Commission in the guidelines** that – as per Recommendation 1 – **it should issue** on the application and enforcement of the proposed Regulation (if and) once it comes into force.

(8) **The Commission should consider extending the territorial scope of application of the proposed Regulation to situations where parenthood was established in a third State,** for two reasons.

First, given that the aim of the proposed Regulation is to protect and respect the fundamental rights – and best interests – of children, it will be difficult to justify the exclusion from its protection (*and the continuing violation of their right to respect for private life* under Article 8 ECHR, as established in the ECtHR case-law analysed in chapter 3 of the study) of *some* children, namely, children who happened to have been born in a third State where their parenthood was established. In particular, **such an exclusion amounts to discrimination based on birth contrary to Article 21 of the Charter**.

Second, as ECHR signatory States, all **EU Member States are already required by Article 8 ECHR as interpreted by the ECtHR in its case-law** – analysed in chapter 3 of this study – **to recognise the parenthood of (surrogate-born and adopted) children as this was established *in any country (including in a third country)***: accordingly, in practice, the extension of the territorial scope of the proposed Regulation to cover situations where parenthood was established in a third country **would not impose a new obligation on EU Member States, as they are already bound by such an obligation** by the ECtHR jurisprudence, through their ECHR membership. Furthermore, as noted earlier, such an obligation can be read as stemming from Article 7 of the **Charter** which lays down, inter alia, the right to private life, since Article 52(3) of the Charter provides that Charter rights which correspond to ECHR rights must be interpreted in a way which grants *at least* the same protection as granted by the ECHR rights.

(9) Due to the requirement of unanimity in the Council laid down in the legal basis chosen by the Commission, EU institutions need to work hard in **convincing *all* Member States to approve in the Council the proposal (at least) as it is**. The endless continuation of negotiations on the original proposal until – in some unspecified date in the future – there is appetite for its adoption by all Member States, the approval of a watered-down version of the original proposal, or the adoption of the proposal through enhanced cooperation by only some Member States, are **not satisfactory alternatives** in case it is not possible to reach unanimity in the Council.

In addition to the above recommendations, which relate specifically to the proposal examined in this study, the following recommendations are made in order to enhance the cross-border recognition of parenthood under the *current* legal framework (which was analysed in chapter 3 of the study):

(10) If **Bulgaria** continues to fail to comply with the CJEU judgment in *V.M.A.* concerning the cross-border recognition of parenthood for the purpose of the exercise of rights derived from EU law, **the Commission should take enforcement action** against that Member State under Article 258 TFEU for failing to comply with its obligations under EU law. The Commission should also examine whether the **other 26 Member States** comply with the judgment and take enforcement action against any that do not comply.

(11) The Commission should issue a **Communication** clarifying that in situations that fall within the scope of EU law, all Member States must **ensure the continuity, in law, of the filiation of a child** – whether this was established in a Member State or a third country – at least[345] in all the circumstances that, according to **ECtHR case-law**, this is required under the ECHR.

[345] It should be recalled that according to Article 52(3) of the Charter, 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Petitions, has as its aim to analyse the Commission's proposal for a Regulation on the recognition of parenthood in the EU. The study examines the problem of non-recognition of parenthood between Member States and its causes, the current legal framework and the (partial) solutions it offers to this problem, the background of the Commission proposal, and its text. It also provides a critical assessment of the proposed Regulation and issues policy recommendations for its improvement.

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